161 U.S. 85

TRANSCRIPT OF RECORD.

161-85

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~1011~~. 608

CHARLES SMITH, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED MAY 7, 1895.

(15895.)

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a In the circuit court of the United States for the western district of Arkansas.

Pleas and proceedings before the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court in case of

UNITED STATES
vs.
CHARLES SMITH. } Indictment for murder. No. 100.

1 United States of America, western district of Arkansas. In the circuit court, Aug. term, A. D. 1894.

UNITED STATES
vs.
CHARLES SMITH. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present: That Charles Smith, on the 27th day of Sept., A. D. 1894, at the Creek Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one John Welch, a negro and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said Charles Smith, with a certain pistol then and there charged with gunpowder and one leaden bullet, which said pistol he, the said Charles Smith, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off to, against, and upon the said John Welch, and that the said, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said Charles Smith discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said John Welch, in and upon the right shoulder and right side of the neck and right hip and belly of him, the said John Welch, then and there, with the leaden bullets aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said Charles Smith in
2 and upon the right shoulder, right side of the neck, and right hip and belly of him, the said John Welch, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said John Welch, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Charles Smith him, the said John Welch, in the manner and by the means aforesaid, wilfully and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

JAS. F. READ,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) No. 101. United States vs. Charles Smith. Murder. A true bill. S. A. Williams, foreman. Witnesses: William

James, Muskogee, I. T.; Ella Landers, Muskogee, I. T.; Samuel Newlin, Muskogee, I. T.; John Jacobs, Muskogee, I. T.; John Wombles, Muskogee, I. T.; George Twigs, Muskogee, I. T.; George Turner, Muskogee, I. T.; Frances Brooks, Naota, Kansas; Joseph Armstrong, Muskogee, I. T.; James Evans, Muskogee, I. T.; Louisa Welch, Salina Dixon, Charles Phillips, H. B. Chatman, Martha Crosby, Wiley Dansby, James Shines, Wiley McIntosh, Rose Marshal, Jim Richardson, Wm. James, Geo. Colbert, Muskogee, I. T.; Scott Gentry, Choska, I. T.; Sage Turnwell, Wm. Newsome, Muskogee, I. T.; N. B. Childers, Dave Marshal, Wagoner, I. T.; Scott, Van Buren, Ark.; Wesley McCoy, Brazil, I. T.; J. B. Stansberry, Chas. Clardy, Ft. Smith, Ark.; Prince Lowry, Harris, Choska, I. T. Filed in open court, Oct. 22, 1894. S. Wheeler, clerk. By I. M. Dodge, D. C.

3 United States of America, western district of Arkansas, in the circuit court, August term, A. D. 1894.

UNITED STATES *vs.* CHARLES SMITH. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas, upon their oath present: That Charles Smith, on the 27th day of Sept., A. D. 1894, at the Creek Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Robert Marshal, an Indian United States deputy marshal for the United States court situated at Muskogee, Indian Territory, lawfully engaged in a duty imposed upon him as such deputy marshal, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Charles Smith, with a certain pistol, then and there charged with gunpowder and one leaden bullet, which said pistol he, the said Charles Smith, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off to, against, and upon the said Robert Marshal; and that the said, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder aforesaid, by the said Charles Smith discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said Robert Marshal, in and upon the breast and back of him, the said Robert Marshal, giving to him, the said Robert Marshal, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said Charles Smith, in and upon the breast and back of him, the said Robert Marshal, one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal
4 wound he, the said Robert Marshal, then and there instantly died.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Charles Smith him, the said Robert Marshal, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

5 2nd count. The grand jurors of the United States of America duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present: That Charles Smith, on the 27th day of Sept., A. D. 1894, at the Creek Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Robert Marshal, who was at the time aforesaid an Indian policeman appointed under the laws of the United States, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Charles Smith, with a certain pistol then and there charged with gunpowder and one leaden bullet, which said pistol he, the said Charles Smith, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off to, against, and upon the said Robert Marshal, and that the said Charles Smith, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said Charles Smith discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said Robert Marshal, in and upon the breast and back of him, the said Robert Marshal, giving to him, the said Robert Marshal, then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said Charles Smith in and upon the breast and back of him, the said Robert Marshal, one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound he, the said
6 Robert Marshal, then and there instantly died.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Charles Smith him, the said Robert Marshal, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

7 3rd count. The grand jurors of the United States of America duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present: That Charles Smith, on the 27th day of Sept., A. D. 1894, at the Creek Nation, in the Indian country within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Robert Marshal, who was, previous to time aforesaid, an Indian United States deputy marshal, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Charles Smith, with a certain pistol, then and there charged with gunpowder and one leaden bullet, which said pistol he, the said Charles Smith, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought did discharge and shoot off to, against, and upon the said Robert Marshal, and that the said with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said Charles Smith discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said Robert Marshal, in and upon the breast and back of him, the said Robert Marshal, giving to him, the said Robert Marshal, then and there with the leaden

bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said Charles Smith, in and upon the breast and back of him, the said Robert Marshal, one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal
8 wound he, the said Robert Marshal then and there instantly died.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Charles Smith, him, the said Robert Marshal, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

9 4th count. The grand jurors of the United States of America duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present: That Charles Smith, on the 27th day of Sept., A. D. 1894, at the Creek Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Robert Marshal, at that time an Indian deputy United States marshal, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Charles Smith with a certain pistol, then and there charged with gunpowder and one leaden bullet, which said pistol he, the said Charles Smith, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off to, against, and upon the said Robert Marshal, and that the said Charles Smith with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said Charles Smith discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said Robert Marshal, in and upon the breast and back of him, the said Robert Marshal, giving to him, the said Robert Marshal, then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said Charles Smith in and upon the breast and back of him, the said Robert Marshal, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal
10 wound he, the said Robert Marshal, then and there instantly died.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Charles Smith him, the said Robert Marshal, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

JAS. F. READ,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) No. 99. United States vs. Charles Smith, murder. A true bill. S. A. Williams, foreman. Witnesses: William James, Ella London, Samuel Newlin, John Jacobs, John Wombles, George Twigs, George Turner, Joseph Armstrong, James Evans, Louisa Welch, Salina Dixon, Charles Phillips, H. Buchanan, Martha Crosby, Vicey Daniels, James Shines, Wiley McIntosh, Muskogee, I. T.; Rose Marshall, 6 mi. north of Muskogee, I. T.; Jim Richardson, Wm. James, Leo Colbert,

Muskogee, I. T.; Scott Gentry, Choska, I. T.; Sage Burnwell, Wm. Newsome, Muskogee, I. T.; N. B. Childers, Dave Marshal, Wagoner, I. T.; Jim Wood, Van Buren, Ark.; Wesley McCoy, Brazil; J. B. Stansberry, Chas. Clardy, F. H. Smith, Frances Brooks, Neosho, Mo.; Prince Lowry, Harris, Choska, I. T.; Frances Brooks, Naota, Kas.; Sam Grayson, Hervey Dewit, Jim Colbert, Nannie Grayson, Muskogee, I. T.; A. C. Gregory, Talequah; Gabriel Marshal, Whybark; Dove Marshal, Wagoner; Sam'l Monday. Filed in open court Oct. 22, 1894. S. Wheeler, clerk. By I. M. Dodge, D. C.

11 *Record entries.*

In the circuit court of the United States for the western district of Arkansas, Aug. term, 1894.

MONDAY MORNING, 8½ *o'clock, Oct.* 29, 1894.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES *vs.* CHARLES SMITH. } Indictment for murder. No. 99.

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorney, and having had hearing of said indictment and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment and puts himself upon the country.

UNITED STATES *vs.* CHARLES SMITH. } Indictment for murder. No. 100.

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorney, and having had hearing of said indictment and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment and puts himself upon the country.

NOV. TERM, 1894, *Monday, Nov.* 19, 1894.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application, verified upon oath, praying for witnesses in his behalf at
12 the expense of the United States. Said application coming on to be heard and the court being fully advised in the premises doth allow the same. It is therefore ordered that the legal expense of procuring the testimony of K. B. Brown, James Smith, William Gentry, Rosell

MrKey, C. C. Ransom, Alfred Shobe, David Roberts, Fred Virgil, and Alex Lowe, in behalf of said defendant, be paid by the United States, and that a subpœna be issued for them returnable Dec. 13, 1894.

FRIDAY, *Nov.* 23, 1894.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files an additional application, verified upon oath, praying for witnesses in his behalf at the expense of the United States. Said application coming on to be heard and the court being fully advised in the premises doth allow the same. It is therefore ordered that the legal expense of procuring the testimony of Sallie Grayson, Alex Coats, and John Vann, in behalf of said defendant, be paid by the United States, and that a subpœna be issued for them returnable Dec. 13, 1894.

SATURDAY, *Nov.* 24, 1894.

(Caption omitted.)

On this day, on motion of counsel for the defendant, it is ordered by the court that this cause be, and the same is hereby, continued to the February term, 1895, of this court, and set down for trial February 12, 1895.

FEB. TERM, 1895, *Friday, Feb.* 8, 1895.

(Caption omitted.)

On this day come the said defendant by his attorney and files his application, verified upon oath, praying for witnesses in his behalf at the expense of the United States.

SATURDAY, *Feb.* 9, 1895.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files an
13 additional application for witnesses in this cause, which was by the court allowed for Peter Nations, and a subpœna ordered to be issued for him returnable Feby. 12, 1895.

TUESDAY, *Feb.* 12, 1895.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application verified upon oath praying for witnesses in his behalf at the expense of the United States. Said application coming on to be heard and the court being fully advised in the premises doth allow the same.

It is therefore ordered that the legal expense of procuring the testimony of Peter Button, Martha Hendrich, and J. B. Nedry, in behalf of said defendant, be paid by the United States, and that a subpœna be issued for them returnable forthwith.

FRIDAY, *Feb.* 15, 1895.

(Caption omitted.)

On this day come the said defendant, by this attorney, and files a demurrer to the indictment herein ; said demurrer coming on to be heard and the court being well and sufficiently advised in the premises, doth overrule said demurrer, to which ruling of the court the defendant at the time excepted.

UNITED STATES
vs.
CHARLES SMITH. } Indictment for murder. No. 99.

and

UNITED STATES
vs.
CHARLES SMITH. } Indictment for murder. No. 100.

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Thos. Marcum and C. J. Frederick, esq., and Jas. B. Rutherford, esq.;
14 whereupon by order of court these causes were consolidated for trial to be tried as one cause. And it appearing from the returns of the marshal that the said defendant has been served with duly certified copies of the indictments in these causes, and full and complete lists of the witnesses in these causes, and that he has also been served with a full and complete list of the panel of petit jurors and alternates as selected and drawn by the jury commissioners for the present term of this court, more than two entire days heretofore; and having heretofore had hearing of said indictments and pleaded not guilty thereto, it is on motion of plaintiff by its attorney ordered by the court that a jury come to try the issue joined. Whereupon after counsel for both plaintiff and defendant had exercised in the presence of the defendant their full right of challenge under the law, the following jurors were selected for the trial of this cause, to wit:

John C. Armstead, Thos. P. Davis, Ben F. Donathan, Geo. T. Galloway, John B. George, John Henson, Chas. C. Mulvaney, Richard McEachin, David S. Patrick, Daniel Baker, Silas K. Robinson, Theodore Vogel, twelve good and qualified electors of the district aforesaid, duly selected, empaneled, and sworn to try the issues joined and true verdicts render according to the law and the evidence, and after hearing a statement of the case by counsel, and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court.

And it is further ordered by the court that said jury be kept together, and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

15 SATURDAY, *Feb.* 16, 1895.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Thos. Marcum, esq., C. J. Frederick, esq., and J. B. Rutherford, esq.; and now come the jury, heretofore empaneled for the trial of these causes, in charge of a sworn bailiff of this court to wit:

John C. Armstead, Thos. P. Davis, Ben F. Donathan, Geo. T. Galloway, John B. George, John Henson, Chas. C. Mulvaney, Richard McEachin, David S. Patrick, Daniel Baker, Silas K. Robinson, Theodore Vogel, who took their seats in the jury box, and after hearing a portion of the evidence, and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

MONDAY, *Feb.* 18, 1895.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Thos. Marcum, esq., C. J. Frederick, esq., and J. B. Rutherford, esq.; and now come the jury, heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit:

John C. Armstead, Thos. P. Davis, Ben F. Donathan, Geo. T. Galloway, John B. George, John Henson, Chas. C. Mulvaney, Richard McEachin, David S. Patrick, Daniel Baker, Silas K. Robinson, Theodore Vogel, who took their seats in the jury box, and after hearing further evidence, and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

16 TUESDAY, *Feb.* 9, 1895.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Marcum, Frederick & Rutherford; and now come the jury, heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit:

John C. Armstead, Thos. P Davis, Ben F. Donathan, Geo. T. Galloway, John B. George, John Henson, Chas. C. Mulvaney, Richard McEachin, David S. Patrick, Daniel Baker, Silas K. Robinson, Theodore Vogel, who took their seats in the jury box and heard the remainder of the evidence. Whereupon the defendant, by his counsel, moved the court orally to require the Government to elect upon which indictment it would claim a verdict in these causes, which motion was by the court overruled. Thereupon the argument of counsel was heard, and there not being time to further progress in the trial of this cause, the jury was put in charge of tha sworn bailiff aforesaid.

WEDNESDAY, *Feb.* 20, 1895.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Marcum, Frederick and Rutherford; and now come the jury, heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit:

John C. Armstead, Geo. T. Galloway, John B. George, John Henson, Thos. P. Davis, Chas. C. Mulvaney, Richard McEachin, David S. Patrick, Ben F. Donathan, Daniel Baker, Silas K. Robinson, Theo-
dore Vogel, who took their seats in the jury box and received
17 the charge of the court, to which said charge the defendant, by his counsel, in the presence of the jury, excepted. Thereupon said jury retired in charge of the sworn bailiff aforesaid, to consider of their verdicts, and after a short time returned into court the following verdicts, to wit:

Indictment No. 100: "We, the jury, find the defendant, Charles Smith, guilty of murder for feloniously, wilfully, and with malice aforethought killing John Welch as charged in the within indictment."

(Signed) S. K. ROBINSON, *Foreman.*

Indictment No. 99: "We, the jury, find the defendant, Charles Smith, guilty of manslaughter, as charged in the 2nd count of the within indictment."

(Signed) S. K. ROBINSON, *Foreman.*

Whereupon, by order of the court, the jury was discharged from the further consideration of the case and the said defendant was remanded to the custody of the marshal to await final sentence.

TUESDAY, *Feb.* 26, 1895.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his motion to set aside the verdicts of the jury returned against the said defendant on the 20th day *day* of Feb., 1895, and for a new trial in this cause.

MONDAY, *April* 15, 1895.

(Caption omitted.)

On this day come on to be heard the motion heretofore filed herein to set aside the verdict of the jury and for a new trial in this cause, and the court being well and sufficiently advised in the premises doth overrule said motion.

18 *Indictment for murder, No.* 100.

On motion of Jas. F. Read, esq., attorney for the western district of Arkansas, the said defendant was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause on the 20th day of Feb., 1895, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said. Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said Charles Smith be deemed, taken, and adjudged guilty of the crime of murder, and it is ordered by the court that the said marshal of the district aforesaid cause the said Charles Smith to be taken hence, and him, the said Charles Smith, safely and securely keep from the date hereof until Tuesday, the 25th day of June, A. D. 1895, and on that day, and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said Charles Smith to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon on Tuesday, the said 25th day of June, in the year of our Lord one thousand eight hundred and ninety-five, cause the said Charles Smith to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution therefor. And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same.

19 (Caption omitted.)

Ordered by the court that defendant be granted until April 29th to prepare and file his bill of exceptions herein.

MONDAY, *April* 29, 1895.

(Caption omitted.)

On this day come the said defendant, by his attorney, C. J. Frederick, esq., and tenders his bill of exceptions and asks that the same be signed and made a part of the record in this cause, which is accordingly done.

Also files his assignment of errors and petition for writ of error to the Supreme Court of the United States, together with his petition supported by affidavit praying for an appeal in this cause at the expense of the United States.

WEDNESDAY, *May* 1, 1895.

(Caption omitted.)

On this day comes the clerk of this court and makes known that a writ of error taking this case to the Supreme Court of the United States has been issued by said clerk.

It is therefore hereby ordered by the court that execution of sentence heretofore pronounced herein be stayed pending the action of the Supreme Court.

20 *Bill of exceptions.*

In the circuit court of the United States for the western district of Arkansas.
February term, 1895.

UNITED STATES
vs.
CHARLES SMITH. } Murder.

Be it remembered that this the day of February, 1895, came on to be heard the above-stated case. Whereupon the defendant filed his demurrer to indictment No. 100, charging him with the murder of John Welch, which demurrer was by the court overruled and the defendant at the time excepted.

The district attorney then moved the court to consolidate the indictment No. 99, charging him with the murder of Robert Marshal, and indictment No. 100, charging him with the murder of John Welch. The defendant objected to this motion because he contended that the indictments charged two separate and distinct offences. The court overruled defendant's objection and ordered that the defendant be put upon trial upon both indictments at the same time. Excepted.

Whereupon a jury was empaneled to try the defendant upon both the indictments. The district attorney representing the United States, to maintain the issues on their part, introduced the following-named witnesses:

Louisa Welch, Rose Marshal, John Jacobs, Scott Gentry, Joseph Armstrong, David Harrison, J. B. Stansberry, Henry Dewit, Sam Newlin, Ella London, Prince Lowry, George Triggs, Jim Richardson, Francis

Brooks, Wiley McIntosh, George Turner, commission of Robert Marshal as U. S. Indian policeman, William Newsome, who testified as follows:

21 LOUISE WELCH, having been duly sworn upon behalf of the Government, was examined by J. B. McDonough, the assistant district attorney, and testified as follows, to wit:

Question. Your name is Louise Welch, is it?
Answer. Yes, sir.
Q. Where do you live?
A. Muskogee.
Q. You knew John Welch?
A. Yes, sir.
Q. Was he your husband?
A. Yes, sir.
Q. Are you a citizen of the Creek Nation?
A. Yes, sir.
Q. Is your husband living or dead now?
A. He is dead.
Q. When was he killed?
A. He was killed in September.
Q. Last September (1894)?
A. Yes, sir.
Q. Where?
A. At the fair ground.
Q. In what nation?
A. In the Creek Nation, at Muskogee.
Q. Was your husband a citizen of the Creek Nation?
A. He wasn't; no, sir.
Q. He was a colored man, was he?
A. Yes, sir.
Q. Do you remember the time in September he was killed?
A. It was last year.
Q. What time of the month of September, do you remember?
A. 1894, if I am not mistaken.
Q. I am speaking of the time of the month.
A. It was on the 27th of September.
Q. Were you at the fair ground when he was killed?
A. Yes, sir; I was out there when he was shot.
Q. What time had you gone out there?

A. We had a stand out there. I was out there and had went
22 down town and back—just got back before the shooting occurred.

Q. What kind of a stand did you and your husband have?
A. We had a stand feeding people.
Q. Go on in your own way and tell us what you saw and heard in connection with that killing.
A. Well, just as we come back from down town and got out of the carriage Mr. Smith was there, and I heard him say to him, "God damn you, do you take it up?" and just as he said that he broke and run, and as he broke and run he come running back, and he said something to my husband, but I didn't understand what he said, and when he said that he shot, and when he shot the first shot my husband turned his back, and

kind of started away, and he shot again, and shot him under his left shoulder, and then he shot again, and the ball went right below his hip, and a little below his pants band, and came out down here (indicating), and he went on then across over to the tent and laid down in the dance hall, and then walked back to our tent and laid down.

Q. Who was that?

A. My husband.

Q. What became of him then?

A. They took him on to town.

Q. When did he die?

A. He died on Saturaday morning.

Q. What day was that on?

A. The 29th, I think, if I am not mistaken.

Q. What day of the week? How many days did he live?

A. He was shot on Thursday, and he died on Saturaday morning.

Q. He was shot in the shoulder, you say?

A. Yes, sir.

Q. Did that ball hit him anywhere else other than in the shoulder?

A. The ball that hit him in the shoulder, it come out right here
23 [indicating in cheek]—it didn't come out there, but it lodged there.

Q. And the third shot him in the back?

A. Yes, sir; in the pants band, and came out.

Q. What became of the defendant, Charley Smith?

A. I did not see him after that; after my husband came back to our tent I never saw him any more.

Q. Was your husband armed in any way?

A. No, sir; he didn't have anything.

Q. What was it that you heard Charley Smith say to your husband? Please repeat it.

A. I heard him say just as we got out of the carriage to step on the inside of the tent—I heard him say there to him, "God damn you, did you take it up?"

Q. That was Charley Smith said that to your husband?

A. Yes, sir.

Q. What had your husband said immediately before that?

A. I don't know what he said.

Q. That is the first words that you heard said?

A. Yes, sir; that is the first that I heard Mr. Smith say?

Q. Had you seen any difficulty between them before that?

A. No, sir; I didn't.

Q. Did you see any difficulty between Samuel Newlin and the defendant?

A. No, sir.

Q. When Charley made that remark to your husband, did your husband say anything?

A. When he said, "God damn you, did you take it up," he said, "Yes; I had a right to take it up." When he said that, Mr. Smith broke and run, and finally he come running back.

Q. Did Mr. Smith have any pistol at the time he said that, that you saw?

A. No, sir; he didn't have any pistol then.

24 Q. And when he came running back did he have any pistol?

A. Yes, sir; he had a pistol.

Q. How did he have the pistol?

A. He had it in his hand, kind o' that way [indicating,] if I am not mistaken.

Q. Where was your husband at that time?

A. He was standing right in front of our tent, our place of business.

Q. What direction did Smith go to get the pistol?

A. He went south.

Q. That tent street runs in what direction, north, south, east, or west, or how?

A. North and south street.

Q. He went down that street, then, did he?

A. Yes, sir.

Q. Was your tent north or south of Charley's—Smith's—tent?

A. Our tent was on the north side of his tent.

Q. On the same side of the street, or on the opposite side?

A. On the same side of the street his tent was on.

Q. Did you see where he got the pistol?

A. No, sir; I never seen where he got it.

Q. Your husband was standing right in front of your tent when he returned?

A. Yes, sir; right in front of our tent.

Q. What did Smith say, if anything, when he returned?

A. He said something, but I didn't understand what he said.

Q. How far were you from them?

A. I was standing on the inside of the tent. My husband was on the outside. I don't know how far I was from him, but it wasn't very far. I just stepped on the inside of the tent, and had gone back a little.

Q. Was it as far as from you to me from your husband at the time the shot was fired?

A. Yes, sir, I think so, if I am not mistaken.

25 Q. I want to know whether it is that far, or further, or nearer?

A. It was just about that far, I guess.

Q. What was your husband doing there at the time; was he doing anything or was he standing there?

A. He was sitting down.

Q. Sitting down when Smith came with the pistol?

A. No; he was standing on the outside of his tent, with his hands hanging down.

Q. Was his face or back to Smith when Smith came up?

A. His face was to him.

Q. How near was Smith to him when Smith fired the shot—the first one?

A. He was right behind him.

Q. What did your husband do when the first shot was fired?

A. He just turned his back and started off.

Q. Was there anything said by Smith or your husband either?

A. I never heard him say anything.

Q. How far was Smith from your husband at the time the second shot was fired?

A. He wasn't very far. I don't know for certain how far he was, but he wasn't very far. He fired the first shot and second shot, and then the next, and my husband just kept walking.

Q. You didn't, then, see what become of Smith?

A. No, sir; I never seen him.

Q. Your husband died from his wounds, did he?

A. Yes, sir; he did.

Cross-examination by Mr. THOMAS MARCUM:

Q. You say you had just returned in a carriage to the tent?

26 A. Yes, sir.

Q. What time of day was it that he was shot?

A. Between 11 and 12 o'clock.

Q. Where had you been?

A. I was down town; went down town to get some things.

Q. Where did you go in town?

A. I went down at Mr. Patterson's store, and went around down home and back.

Q. What time did you start to town?

A. I guess it was about half past 9 o'clock. It might have been later or sooner.

Q. Who carried you down there?

A. My little brother.

Q. Where is he?

A. He is at home.

Q. Whose carriage did you have?

A. I had mine—mama's.

Q. How far is it from your tent to town?

A. I don't know how far it is from the fair grounds to town.

Q. It is over half a mile, is it not?

A. It might be.

Q. How long did you remain in town?

A. Well, we didn't stay down town very long.

Q. Did anybody go with you?

A. Yes, sir; my sister went with me.

Q. What is her name?

A. Salina.

Q. Salina what?

A. Dickson.

Q. Is she here?

A. Yes, sir; she is here.

Q. Where did you drive to when you went back to the tent?

A. Drove right up in front of our tent and got out.

Q. You drove up through the gate and went to your tent?

A. Yes, sir—through the gate.

Q. And you got out right in front of the tent?

A. Yes, sir.

Q. Where was your husband when you got up to your tent?

27 A. My husband was on the inside of the tent.

Q. Where was Charley Smith?

A. He was on the outside, right in front of our tent.

Q. How far from Welch was he at that time?

A. He was right close to him.
Q. Was there any wagons in the tent lot there at that time?
A. I don't know; I never noticed.
Q. It was impossible to drive more than one wagon through at a time, was it not?
A. Yes, sir; I guess two wagons could not get through the gate; but there was more than two wagons could stand in the street.
Q. Could any more than one wagon stand inside of that tent street?
A. There was room for two or three wagons to stand there in that street after you had gone inside of the gate.
Q. How wide were the tents apart?
A. I don't know how wide they were apart.
Q. You say two or three wagons could stand side by side in that tent street?
A. I say I think they can. I know that more than one can stand there, but I don't know how many.
Q. You don't know whether there was any wagons standing in there when you drove in or not?
A. No, sir; I don't know whether there was or not, but ours—the one we were in.
Q. You did not see any wagons at all that you remember of?
A. No, sir; I wasn't paying any attention.
Q. Did you see Sam Newlin?
A. I never saw him. I never saw him when the fuss occurred. I wasn't there when it first started.
Q. Who got out of your carriage first, you or your sister?
A. My sister got out first.
28 Q. What did she do?
A. She didn't do anything. She was in there by our stand.
Q. She was standing there, was she?
A. Yes, sir.
Q. Did you get out immediately after she did?
A. Yes, sir; I got out right after she did.
Q. Where did you and she go?
A. We were standing right there in front of the door.
Q. Did you remain there until the shooting was over?
A. Yes, sir; I remained there until it was over. I remained there until my husband got up, came over on this side, and went in the tent and laid down.
Q. You staid in your tent?
A. Yes, sir; there right on the inside of our tent.
Q. When did you go inside?
A. I went inside after I got out of the carriage.
Q. You say you were standing on the outside when the shooting occurred?
A. No, sir; I was standing on the inside.
Q. You knew that Smith was shooting at Welch?
A. Yes, sir.
Q. And you stood there and waited until it was all over, did you?
A. Yes, sir; I staid right there and looked at it.
Q. And waited until it was all over?

A. Yes, sir.

Q. You never moved out of your tracks until it was all over, did you?

A. No; I never.

Q. And then you walked over to where your husband was?

A. I didn't go over there where my husband was at all. He got up and walked back to our tent and laid down.

Q. The tent next to the defendant's tent?

A. Yes, sir.

Q. He came back there himself, did he?

29 A. Yes, sir; he walked back there himself and laid down.

Q. How far did he have to walk to get back to the tent?

A. Oh, I don't know how far the tents was apart. The tent was one one side and they were on the other side I don't know how far they were apart, or how wide the street was.

Q. Was he on the east side or west side of this street that went up between the tents?

A. When he first laid down he was on the east side. He got up and walked back to the west side. We were on the west side of the street.

Q. Did you know he was shot before he walked back home to his tent?

A. Yes, sir; I knew he was shot. I was looking right at him.

Q. What were you doing while your husband was over there at the other tent?

A. I wasn't doing anything. I could not say nothing?

Q. Where was your sister during the time of this shooting?

A. She was right there in the tent.

Q. Standing by you?

A. Yes, sir; she was not standing very far from me.

Q. You and she both stood there until it was all over, and remained there until your husband went over to Ketch Loren's tent, was it not?

A. Yes, sir.

Q. A. And came back to your tent?

A. I did.

Q. Your husband came back to your tent?

A. Yes, sir.

Q. Who came with him?

A. I don't know that anybody did. I never saw anybody come with him. I think he came back there himself and laid down. I never saw anyone with him.

Q. How long was he gone?

30 A. He just did lay down, and then got right up and walked to our tent and laid down.

Q. You met him, then, as he came in?

A. He lied down. I didn't meet him. And he stepped back in a little place where we were sleeping.

Q. And that was all there was of it?

A. Yes, sir; that is all I seen of it.

Q. Did you see anybody else there at that time besides yourself and your sister and husband and Smith?

A. There was a good many there, but I didn't pay any attention to other people. I know my sister was there.

Q. You don't know where Newlin was?

A. No, sir; I never seen him.
Q. There was three shots fired?
A. Yes, sir.
(Witness excused.)

31 SAMUEL NEWLIN, having been duly sworn upon behalf of the Government, was examined in chief by James B. McDonough, the assistant district attorney, and testified as follows, to wit:

Question. Your name is Samuel Newlin?
Answer. Yes, sir.
Q. Where is your home?
A. I live at Muskogee.
Q. Do you know Charley Smith, the defendant?
A. Yes, sir.
Q. Did you know John Welch in his lifetime?
A. Yes, sir.
Q. Did you know Robert Marshal?
A. Yes, sir.
Q. Were you at the fair grounds on the day of the killing of John Welch and Robert Marshal?
A. Yes, sir.
Q. What were you doing on that day?
A. Driving a delivery wagon for the Muskogee Produce Company.
Q. What were you delivering?
A. Chickens, eggs, butter, and such things.
Q. Did you have any conversation or talk with the defendant, Charles Smith?
A. Yes, sir.
Q. Begin at the beginning of what you had to say to him, and tell all you know about that killing, and talk loud enough so we can hear you.
A. It was just a little before 12 o'clock, I should judge, I went down with a load of chickens and things for delivery, and I dorve in to the west of the fair ground. There is a place where they had a lot of tents and swings and things outside, where they went out there to keep from paying taxes to the fair ground, and there was a little way betwixt that,
32 and I drove into this little way, and was delivering chickens, and Charley comes to me and he says, "Take that team out of here or I will cut every rein off of it." I says, "Oh, I guess not." I supposed he was joking with me, as we had always been good frieneds and nothing betwixt us, and he sayd, "I will show you," and he cut the reins. I saw he was angry, and I picked up half a dozen chickens and delivered them where I had to deliver then, and then I come back and got a dozen for John Welch. And by this time I st'rted with anotjer half dozen to la'd there, and he came in the tent where I was and curesed me and told me he would cut me. I saw he was angry, and I never said a word to him. I passed on in to the back part of the tent, and he then went out and took my tema, horse and buggy, and carried it on the outside. I delivered what stuff I had there and went into the fair gtound and delivered an lot of chickens and gees' and things there. I went to see Bud Kell, who was an Indian police there, and I says to him, "Can there be nothing done with a man that will cut a man's rœins when he is doing nothing to him?" And

he says, "You will have to go and see Mr. Jackson." So after I had fixed everything I met John Collins, and we came on back about half an hour after the first time I had been in there. When I got inside of the little alleyway opposite John Welch's tents I meets Charley. He sayd, "By God ain't you got enough yet?" He had his knife in his hand, and I receeded from him. I was afraid to speak and dind' say anything, and he curzed me a time or two, and this boy John Welch says, "Charley, let the old man alone." And he says to him, "What have you got to do with it?"
33 and he says, "Well, what have you got to do with it?" and he says, "Well, I have got nothing particular to do with, only let him alone. He is not bothering with you." He says, "Have you got him employed here?" and he says, "No, I have not got him employed, but he brings chickens and things like that," and quite a dialogue took place between them, and after awhile words got rougher and rougher, and finally Charkey told him, "Do you take up for him?" and he says, "Yes," and he says, "If you do, by God, I will fix you!" and Charley starts back into his tent and John Welch steps out from where his tent was, in through the alleyway, or street, and starts out that way. By this time Charley comes out and he looks around and he sees him, and he stops deliberately, takes his pistol up that way [indicating in a presented position], and he says, "You are a Goddamn bulldozer to take up for him," or words like that, and he shot at him. I don't know whether he hit him the first time or not; anyway, if he did, I should judge he hit about the breast, from the range the pistol was in. John turns himself around and humps up his shoulders, and he shot at him twice more. I think the next time he hit somewhere about in here [indicating in side of back], and by this time Robt. Marshall come up, and he said, "Stop that, Charley; throw up your hands," and Charley turned around and said something, but I don't here what was said then between him and Marshall, and he shot at him; and the next time, it seems to me, I thank Marshall shot at him. It seemed to me that the two pistols went together, and Marshall fell off his horse.

Q. What become of Charley Smith?

A. I don't know what become of him. The crowd was hurry-
34 ing too and fro, and I never saw him any more.

Q. How many times did Smith fire at John Welch?

A. Three times, I think—I know of threee times.

Q. How many times did he fire at Marshall?

A. Twice.

Q. Did John Welch have a pistol?

A. He did not; he was in his shirt sleeves and his hands hanging down.

Q. Waht was he doing while Charley Smith was gone at the time he went off to get his pistol?

A. He wal'ed out of his door and stepped out of his tent. He was standing at the door of his tent and walked right down the broad way.

Q. How long was Charley Smith gone when he went after the pistol?

A. I suppose it was minute or something like that.

Q. *It* What did he say when he first returned with the pistol?

A. From what I could understand, he said he was bulldozing; said he was bulldozer, or something like that.

Q. Called Welch a bulldozer?

A. Yes, sir.

Q. Did Welch make any reply?

A. I don't think *eh* did.

Q. Did Welch make any attempt to do anything to Smith?

A. Nothing on earth.

Cross-examination, Mr. THOS. MARCUM:

Q. You drove over there with a lo'd of chickens?

A. Yes, sir.

Q. What time was it you got there?

A. It was sometime before 12 o'clock, I should judge; I am not positive about the time of day.

35 Q. It was before dinner, wasn't it?

A. Yes, sir.

Q. About how long was it before dinner?

A. I could not tell you, for everything was in a rush and I had a great deal to do, a'd I wasn't particularly paying attention to what time of day it was.

Q. You said awhile ago it was between 11 and *112*?

A. It was *ba*out that, I would judge, but I am not positive about the time of 'ay, because I was busy.

Q. When you d*or*ve in th*eir* between thes*s* tents which dire*c*tion did you come from; did you come in from the north or *spun*th end?

A. South end.

Q. You came in a' the south end, by the merry-go-round?

A. Yes, sir.

Q. Where did you drive to when you stopped?

A. I first stopped at the tent where they 'ere selling fish. I forget the man's name—he was a white man and is selling fish in town here now.

Q. That was the first tent after you got past the merry-go-round, wasn't it?

A. Yes, sir.

Q. Where did you next stop?

A. I stopped right at John Welch's tent; there was on the right hand side a white fellow, but I don't know his name.

Q. Charley Shepard?

A. I would not know his name if I would hear it. He was a little to the right of Welch stand.

Q. On the opposite side of the street?

A. Yes, sir.

Q. There is where you stopped to deliver the chickens?

A. Yes, sir.

36 Q. Who did you deliver them to*o*?

A. I delivered half dozen to a white man there, and I delivered a dozen to Mrs. Welch and Mrs. James.

Q. At the same place?

A. No, sir; right by Charley's tent.

Q. Th*an* you had to pass Charley's tent to deliver the chickens over there to the white man, didn't you?

A. No, sir; I had not.

Q. You came to the white man be*ofr*e you got opposite Welch's tent?

A. They are not exactly opposite, but one drive accomplished it all. I never moved the wagon until I delivered them all.

Q. Did you stop, then, any more?
A. Yes, sir; I stopped at Hannah Mayfield's.
Q. That is right at the gate, is it *nit*?
A. Yes, sir; right at the gate.
Q. She had the first tent on the left as you entered the gate, didn't she?
A. I'm not positive about that, it was either the first or second.
Q. How lo*mg* did your team stand there in the gate?
A. It didn't stand there any time. I wasn't at the gate.
Q. I mean about the gate ther'?
A. The team wasn't in 40 feet of there. I should judge 30 or 40 feet.
Q. Was there any team in front of you?
A. No, sir; none.
Q. How long did you stand there?
A. I didn't stand there at all.
Q. How long did your team stand there?
A. It didn't sta'd there lon*d*. Charley took the team and carried it outside.
37 Q. About how long?
A. I could not tell you. It could not be ma'y minutes or seconds.
Q. What 'ean by that, that it could not have bee' many minutes or seconds?
A. As soon as I went into Mrs. Mayfi*l*ed's he followed me in there, and I kept on going and he turned back and takes the team and carries it on the ous*t*ide.
Q. On the outside of that tent street ther'?
A. Ye', sir.
Q. Where were you when he led it out?
A. I was in at Mrs. Mayfield's.
Q. How long before you went to your wagon?
A. Immediately.
Q. And then you went where?
A. I drove over to the fair ground.
Q. How long were y'u over there?
A. Nalf an hour, more or less.
Q. What were you doing over there?
A. Delivering chickens, and eggs, and butter, and talking with Bud Kell.
Q. Do you know who you delivered to over there?
A. I carried a load of stuff over the' for Bert Astor's stand, and 4 or 5 others; I don't remember their names now.
Q. How far is from this tent of Mayfi*l*ed's over the fair ground where you went?
A. I can't tell you exactly the distance. It is some dist*n*ace, though.
Q. Is it 10 yerds?
A. I could not say it was——
Q. You had to pass through the front gate of the fair grounds, didn't you?
A. Yes, sir.
38 Q. Which gate did you go into, the first one on the corner or the one where the ticket office is?

A. Yes, sir; where the ticket office
Q. That is the second gate?
A. Yes, sir.
Q. On the west side?
A. That is the north side I would suppose tha' to be.
Q. It is the northwest corner, isn't it?
A. I would call 'hat north.
Q. I know it is on the north side of the fair *b*round.
A. Thes*s*e streets run para'le*l*, do they not, sir?
Q. Which streets?
A. That street running east and west, of course. That would be on the north side, then?
Q. I know you were on the south side of that street.
A. I mean the gate is one——
Q. That is nearer the west cor*e*ner of the fair *g*oround isn't it?
A. I mean the g'te is one the north side of the fair *go*rund.
Q. I u'derstand that; but it was nearer the northwest corner of the fair *go*ru'd?
Q. A. I would think that the middle gate was near about the center of it.
Q. Don't you know it is mile down there to the east side of that fair ground?
A. No, sir; I do not know it.
Q. All *l* the race 'rack is down there?
A. When I am speaking about that I don't mean the race track; I mean in that enclosure there.
Q. I am talking about the fair ground enclosure, the fence that takes it all in.
39 A. If you take it that way it would be the northwest corner.
Q. Did you transc*a*t any other business in the fair ground and talk to Bud Kell at the gate?
Q. Did you talk to Bud Kell before or after you delivered the chi*k*ckens *t*in the fair ground?
A. Before.
Q. Where did you find him?
A. At the gate; he was gate keeper.
Q. How long did you talk with him?
A. I dodn't count the minutes, but I just told my simple story and went in.
Q. What did you say to him?
A*L*. I told him what Charley had done, and asked him if he could not be punished for it, and his remarks was that I would have to go and see the commissioner.
Q. And then you went away?
A. Yes, sir.
Q. After you left the fair ground where did you go?
A. I w*ne*t right back to these tents and things.
Q. What did yo*j* go back there for?
A. I went to get a couple of witnesses.
Q. What for?
A. To prove that Charley had cut my reins and run at me with a knife.

Q. Did you get any witnesses?
A. No, sir; I didn't.
Q. Where did you go to get witnesses? Who did you go to?
A. I did not go to anybody.
Q. How long had you been there before Charley and Welch got to talking?
A. As soon as I come there Charley commenced on me.
Q. Where was Charley? Did you go to him? Did you go right to Charley?
40 A. No, sir; I met him at Welch's tent, or right opposite it.
Q. Where was it? Opposite, or right at it?
A. I would judge it was right at it.
Q. Don't you know where it was?
A. I wasn't paying any particular attention to that, but it was right in front of it.
Q. At that time wher' was Welch?
A. Welch was standing right in the door of his tent.
Q. The front of his tent was all open, wasn't it?
A. If I remember right, it was.
Q. And there was a counter extending along inside of the front, wasn't ther'?
A. I don't know about that; I could not say.
Q. Didn't he have any counter?
A. I could not tell you, for I di'n't pay any attention to it.
Q. Wasn't he selling things in there?
A. I could not tell you.
Q. What was he having the tent for?
A. I could not tell you that, either.
Q. Do you know what he had in it?
A. He cooked in the back part of it.
Q. I am talking about the front.
A. I don't know, sir.
Q. Didn't you see nothing?
A. I wasn't partcular'y looking for nothing and I didn't charge my memory with it.
Q. You saw John Welch standing there? Did you see anything else?
A. I dont't remember of anything *of* else.
Q. You say the front of the tent was all open?
A. Yes, sir.
Q. Don't you recollect whether you saw a counter there or not?
A. No, sir; I don't.
41 Q. Did you see any boxes, or chairs, or tab'es, or anything?
A. I don't remember of seeing them.
Q. Did you see anything at in there?
A. I don't remember, because I had my eye on Charley.
Q. You saw you saw Welch standing there?
A. Yes, sir.
Q. Wasn't there a good many wagons that drove up behind your wagon at the time Charley led it out?
A. I don't remember; there was wagons going and coming all the time.

Q. Don't you that the wagons that piled up behind you there and extended clear back to that fish tent nearly?

A. No, sir; I don't know that.

Q. Don't you know there was no wagons there at all behind you?

A. No, sir.

Q. Did anybody drive up while you were talking there to Charley?

A. I don't remember of seeing anybody drive up.

Q. From either direction?

A. No, sir.

Q. At the time *fo* the shooting, how far was you standing from John Welch's tent?

A. John Welch's tent is on the right-hand *o*side of the s'et*t*, or whatever you call it, as you go in. When Charley came out John Collins and I were together, and I stepped off to the left, to the middle of the street.

(Witness is shown diagram.)

The ASSISTANT DISTRICT ATTORNEY. Does that tent street run east and west or north and south?

A. North and south.

Mr. MARCUM (of counsel for defendant):

Q. Where was Welch's tens?

A. I would judge it was somewhere about the middle of the street.

42 Q. Where wa' Charley Smith's from this tent?

A. I would judge it was right by the side of it.

Q. How far is it from Welch's tent to Charley Smith's tent?

A. I could not tell you that.

Q. Have you any idea?

A. No, sir.

Q. No idea?

A. No, sir; I formed no idea of the distance at all.

Q. Where were you stand' with reference to John Welch's tent when the shooting took place?

A. I was standing about the middle of this stree'. I a*m*ied to get out of the range of the balls.

Q. Were you standing directly in front of Welch's tent?

A. About that.

Q. Where was John Welch from you?

A. He was a little to the right.

Q. He was between you and his tent, then?

A. Yes, sir.

Q. Where was Charley Smith?

A. Charley Smith was east of him, going up——

Q. East or south?

A. South instead of east. It seems that when he was going out he didn't see John. John had kind of passed him, or he had passed John.

Q. Where did he come out from?

A. From this tent.

Q. Which tent?

A. Where he went in to go his pistol.

Q. Where did he go in?

A. He went into the next tent to John Welch's.

43 Q. Where did Charley come out at?

A. He came 'ut of the same tent he went in.
Q. Where is that?
A. That was in the next tent to John Welch's.
Q. You don't know how close they are together?
A. No, sir; I could not tell you.
Q. Where d'd Charley Smith stand when he shot at Welch?
A. He was st'nding in the street.
Q. Where?
A. He was some distance from where he came out of the tent?
Q. Where did he go?
A. I could not tell you that, because I did not stop to measure it.
Q. You pointed out where John Welch was; now, where was Charley?
A. He was just a few feet from John Welch.
Q. In what direction?
A. He was south of John.
Q. Where did Welch go from there when Charley commenced shooting at him?
A. After he shot the first time he turned around and humped up his shoulders and walked north, angling across the street.
Q. Wasn't there a lot of wagons there in that street?
A. No, sir.
Q. Wasn't there one?
A. I di'n't see none.
Q. Didn't somebody drive up about that time?
A. Not that I know of.
Q. Dodn't you know that somebody drove up about that time?
A. No, sir.
Q. Just before that time?
A. No, sir.
44 Q. Are you sure of that?
A. Yes, sir.
Q. Who did you see shoot first, as between Charley Smith and Marshall?
A. Charley shot first.
Q. How many shots did Marshall fire?
A. He f'red one I know of, if not two. I am positive only one.
Q. Didn't he fire twice?
A. I am not positive that he fired twice.
Q. Are you positive that Charley fired twice?
A. Yes, sir.
Q. Why is that you are positive about him firing 'wice and not positive about Marshall?
A. Because I had my eye on Charley.
Q. How could you have your eye on Bob?
A. I could see that.
Q. You could see both ways?
A. Well, I could see that; of course, it was a side view.
Q. On which side of you 'as Bob?
A. He was on the left side.
Q. On your right or left?
A. It would be on my right if I was facing south.
Q. And Charley was on your left?

A. No, sir.

Q. The' Charley and Bob were both on your right?

A. Yes, sir.

Q. Then you had to look the same way and see both of them, didn't you?

A. Yes, sir.

Q. Which side are y'u blind in?

A. Nary side.

Q. I thought you only had one eye? Bob Marshall was shooting right across to Mintor's house, wasn't he?

45 A. I wasn't looking particularly at that.

Q. You know where Mintor lives, don't you?

A. Yes, sir.

Q. He lives right across north of that tent, didn't he, on the opposite side of the street?

A. I could not *d*ay, for I never thought about it.

Q. There is house over there, isn't there?

A. There is several houses over there.

Q. What did Charley do when Marshall fired his forst shot at him?

A. Charley fired the first shot.

Q. What did Charley Smith do when Marshall fired the first shot at him?

A. He fired at him.

Q. C'arley did?

A. Yes, sir.

Q. Was Bob riding or walking?

A. He was riding.

Q. When Smith fired at Marshall, didn't Marshall's horse jump?

A. I don't know anything about that?

Q. You didn't see his horse at that time?

A. I wasn't watching his horse.

Q. You could not very well se' Marshall without seeing the horse which he was riding?

A. Yes, sir; but I wasn't particu*al*rly taking any notice about that.

Q. How long did you remain there after that shootin*f* was over?

A. I remained there in the street until after Charley 'nd all of them were gone, for I could not get out of it. They were no other place to go to.

Q. Where was Welch when you left there?

A. I can not tell you, sir.

46 Q. Did you look after him?

A. No, sir; I didn't.

Q. How long were you there after he was shot?

A. I was there 'ntil Welch was teken up and Marshall was taken up and was carried off the ground.

Q. Where did 'hey take Welch from?

A. I didn't take notice where they took him from.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Where was Marshall shot?

A. I would judge from the way that the blood flowed out of his mouth he must have been shot somewhere in here [witness indica'ing in breast].

A. He came 'ut of the same tent he went in.
Q. Where is that?
A. That was in the next tent to John Welch's.
Q. You don't know how close they are together?
A. No, sir; I could not tell you.
Q. Where d'd Charley Smith stand when he shot at Welch?
A. He was st'nding in the street.
Q. Where?
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A. I could not tell you that, because I did not stop to measure it.
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A. After he shot the first time he turned around and humped up his shoulders and walked north, angling across the street.
Q. Wasn't there a lot of wagons there in that street?
A. No, sir.
Q. Wasn't there one?
A. I di'n't see none.
Q. Didn't somebody drive up about that time?
A. Not that I know of.
Q. Dodn't you know that somebody drove up about that time?
A. No, sir.
Q. Just before that time?
A. No, sir.
44 Q. Are you sure of that?
A. Yes, sir.
Q. Who did you see shoot first, as between Charley Smith and Marshall?
A. Charley shot first.
Q. How many shots did Marshall fire?
A. He f'red one I know of, if not two. I am positive only one.
Q. Didn't he fire twice?
A. I am not positive that he fired twice.
Q. Are you positive that Charley fired twice?
A. Yes, sir.
Q. Why is that you are positive about hi*n* firing 'wice and not positive about Marshall?
A. Because I had my eye on Charley.
Q. How could you have your eye on Bob?
A. I could see that.
Q. You could see both ways?
A. Well, I could see that; of course, it was a side view.
Q. On which side of you 'as Bob?
A. He was on the left side.
Q. On your right or left?
A. It would be on my right if I was facing south.
Q. And Charley was on your left?

A. No, sir.

Q. The' Charley and Bob were both on your right?

A. Yes, sir.

Q. Then you had to look the same way and see both of them, didn't you?

A. Yes, sir.

Q. Which side are y'u blind in?

A. Nary side.

Q. I thought you only had one eye? Bob Marshall was shooting right across to Mintor's house, wasn't he?

45 A. I wasn't looking particularly at that.

Q. You know where Mintor lives, don't you?

A. Yes, sir.

Q. He lives right across north of that tent, didn't he, on the opposite side of the street?

A. I could not *d*ay, for I never thought about it.

Q. There is house over there, isn't there?

A. There is several houses over there.

Q. What did Charley do when Marshall fired his forst shot at him?

A. Charley fired the first shot.

Q. What did Charley Smith do when Marshall fired the first shot at him?

A. He fired at him.

Q. C'arley did?

A. Yes, sir.

Q. Was Bob riding or walking?

A. He was riding.

Q. When Smith fired at Marshall, didn't Marshall's horse jump?

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Q. You didn't see his horse at that time?

A. I wasn't watching his horse.

Q. You could not very well se' Marshall without seeing the horse which he was riding?

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Q. Where was Welch when you left there?

A. I can not tell you, sir.

46 Q. Did you look after him?

A. No, sir; I didn't.

Q. How long were you there after he was shot?

A. I was there 'ntil Welch was teken up and Marshall was taken up and was carried off the ground.

Q. Where did 'hey take Welch from?

A. I didn't take notice where they took him from.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Where was Marshall shot?

A. I would judge from the way that the blood flowed out of his mouth he must have been shot somewhere in here [witness indica'ing in breast].

Mr. MARCUM (of counsel for defendant):

Q. Was he shot in the mouth?

A. I could not tell you where he was shot, only I saw the blood going up.

Q. Was there any blood on his horse?

A. I could not tell you that, sir.

(Witness excused.)

47 ROSE MARSHALL, having been duly sworn upon behalf of the Government, was examined in chief by Mr. J. B. McDonough, the assistant district attorney, and testified as follows, to wit:

Question. Was Robt. Marshall your husband?

Answer. Yes, sir.

Q. He is dead now, is he?

A. Yes, sir.

Q. Were you present at the time of his killing?

A. Yes, sir; I was there.

Q. What were you doin' at the time?

A. I was at the fair.

Q. Did you zsee the shooting of John Welch?

A. No, sir.

Q. Did you hear the shotd?

A. Yes, sir.

Q. Gon on and tell what you know about the mat'er.

A. I was standing talking to another woman, and I heard some firing—I heard three *fries*—and when I looked up I heard some one command Robt. Marshall to make an arrest, and I heard when he spoke—when Robt. Marshall did—and I heard when he spoke; he hollored halt, halt.

Q. Whose name did he call?

A. Charley Smith. He said halt, Charley, and when he said that I seen when took out his pistol, and he raised his hand, and I heard a pistol fire agian, and I don't know whether it was him or not, and when his horse made a short turn the blood poured out of his mouth and I knowed he was shot.

Q. Where was your husband shot?

A. He was shot in the breast.

Q. About where?

48 A. In the breast here; I have got the shirt here to show.

Q. Was he shot more than on'e?

A. No, sir; just only once.

Q. Did that bal' come out through his body?

A. No, sir.

Q. Was your husband an officer?

A. Yes, sir; he was a United States Indian policeman.

Q. How long had he been United States Indian policeman?

Mr. C. J. FREDERICK (of counsel for defendant). We do not think it is competent to prove by parol whether or not Robt. Marshall held a commissioner as an officer.

The ASSISTANT DISTRICT ATTORNEY. I am not proving that he held a commission. I am proving that he was acting as an officer.

Mr. C. J. FREDERICK (of counsel for defenda't). We object to it. There is a competent way of proving that he was an officer. If he was an officer he held that office by some authority.

The COURT. You intend to produce the commission anyway, do you not?

The ASSISTANT DISTRICT ATTORNEY. Yes, sir.

The COURT. If Marshall was acting as an officer there, and this witness knows that he was, she may state that fact.

The ASSISTANT DISTRICT ATTORNEY. The commission has not come yet, has it?

The WITNESS. No, sir.

Q. You sent for it yesterday?

A. Yes, sir.

Q. I am not asking you anything about him having a commission. How long had he been acting as an officer?

49 A. About eight years.

Q. You didn't see the first shooting?

A. No, sir.

Q. You are a citizen up there, are you?

A. Yes, sir.

Q. Your husband was a citizen also there?

A. Yes, sir.

Cross-examination by Mr. THOS. MARCUM:

Q. Where were you when you heard the first shooting?

A. I was standing near there at the fair ground.

Q. Where?

A. Up there at the fair ground.

Q. Whereabouts?

A. Right up where 'hey had a merry-go-round at the fish stand.

Q. We'e you ate the merry-go-round inside of 'he fair ground?

A. Yes, sir.

Q. How far was the merry-go-round efrom the *gar*nd stand?

A. I don't know how far it was; it wasn't very far; it was in talking distance.

Q. What were you doing over there at the merry-go-round?

A. I was just standing there, just like all the other people.

(Witness is here shown diagram.)

Q. The fair ground is on the street running east and west?

A. Yes, sir.

Q. It is on the *sgee*et running from town to the fair ground?

A. Yes, sir.

Q. You were here, inside of the fair ground?

A. Yes, sir.

Q. Did you remain there until the shooting was all over?

A. Yes, sir.

Q. How far were you from the fiont fence of the fair ground there?

A. About five or six steps, I guess.

50 Q. Don't you know that this fence 'hat runs along here wheih encloses that fair ground is about 8 feet tall, and that it is a elsoe boarded fence?

A. Ye', sir.

Q. Don't you know 'hat this fence running along there between 'hat fair ground and these tents is about 8 or 10 feet tall and planked up closely, and how could you possibly seen over there where this shooting occurred? You were on the ground, were you not?

A. Yes, sir; but I was on the inside where the shooting was done.

Q. On the inside of what?

A. On the inside of the fair ground.

A JUROR. Which side of the fence were you on, the outside or inside?

A. I wasn't on the inside, where they run races; I was on the outside of the fence.

Q. Of that tall board fence?

A. Yes, sir; I was on the 'uts'de of that.

The ASSISTANT DISTRICT ATTORNEY:

Q. And the shooting was on the outside, too?

A. Yes, sir; on the outside of where they run the races.

Mr. MARCUM (of counsel for defendant). Q. You know where the roundhouse is?

A. Yes, 'r.

Q. That is in the fair ground?

A. Yes, sir.

Q. Where was this merry-go-round?

A. It was kind of in the north part of it.

Q. In driving in there you drive in right by the ticket office 'hrough the gate and go south?

A. Ye', sir.

51 Q. And you drive some 50 or 75 yards before you get to the roundhouse?

A. Yes, sir.

Q. All that is enclosed in this tall fence?

A. Yes, sir.

Q. You were inside of this big gate, were you not?

A. No, sir.

Q. Where were you?

A. I was on the outside of that.

A JUROR. Q. I think she means she was on the inside of the tent lot.

The WITNESS. Yes, sir; that is what I mean.

Mr. MARCUM (of counsel for defendant). Inside of where these tents were?

A. Yes, sir.

Q. Where were you, then?

A. I could not tell you, for I don't know north from east or west from south right now, because I am at a loss here in this house.

Q. Don't you know where you enter in here, where these tents are a' this big gate, there is tents on both sides?

A. Yes, sir.

Q. How could you have been in five or six feet of this front fence?

A. It was a kind of a street; just runs right up.

Q. Up where?

A. Uo the alley where they had the tents and things.

Q. But you say you were in the corner, here.

A. Yes, sir; I was near about where the merry-go-round was.

Q. There was no merry-go-round in the front corner, was there? The colored merry-go-round was way down here towards that stone mason's, was it not?

A. I don't know, sir. I di'n't know one man from another there, in Muscogee.

Q. Don't you know that the colored merry-go-round was behind all t'ese?

52 A. I don't know whether it was a colored merry-go-around or not; but I was stand' at a merry-go-round that was in there.

Q. Don't you know that tye merry-go-round inside of the fair ground was right in the by the roundhouse?

A. Yes, sir.

Q. You know where these lunch stand' are, all along by the grand stand, don't you?

A. Yes, sir.

Q. Th're is a whole lot of lunch stands all along here under the garnd stands, and lemonade stands, are there not?

A. Yes, sir.

Q. This is the big roundhouse [indicating]?

A. Yes, sir.

Q. Wasn't the merry-go-round right there?

A. Yes, sir; I expect it was. I don't know.

Q. Is that where you was?

A. Yes, sir.

Q. Over that side?

A. Yes, sir.

Q. In the fair ground?

A. No, sir; not exactly in the fair ground.

Q. I don't mean the race track.

A. Yes, sir; it was in the fair ground.

Q. It was in the fair ground?

A. Yes, sir.

Q. The colored merry-go-round was away down southwest of that, wasn't it?

A. I don't know, sir; I never noticed.

Q. You know where they kept their fine horse?

A. I never noticed where they were.

Q. Didn't you ever notice where these stables were?

A. No, sir.

Q. You never saw any stables?

53 A. No, sir; I never noticed to ffind out where they were at all.

Q. Could you see the race track inside of the fair grounds?

A. Yes, sir.

Q. Do you know where John Welch was doing business?

A. No, sir.

Q. Do you know where Charley Smith was doing business?

A. No, sir.

Q. Do you know where Hannah Mayfield was transacting busines' there?

A. No, sir.

Q. You know Hannah, don't you?

A. No, sir; I don't believe I do.
Q. You know John Welch?
A. Yes, sir; I have seen him.
Q. And you know John's wife?
A. Yes, sir.
Q. Was she there with you?
A. No, sir; she wasn't.
Q. Do you know Ketch Loran?
A. No, sir.
Q. Do you Flayed Carver?
A. No, sir.
Q. Do you know Charley Shepherd?
A. No, sir.
Q. From where you were could you see where the race track was—where the horses went around?
A. No, sir.
Q. I asked you a minute if you could see the race track, and you said yes. The race track is right south of the roundhouse, isn't it?
A. Yes, sir; but I was on the outside of where the roundhouse is.
Q. On the outside of what?
A. On the outside of the pailings.
54 Q. What pailings?
A. Thenm tall pailings.
Q. There is no tall pailings th're, is there?
A. No, sir.
Q. What are you talking about p'ilings for then?
A. I am talking about pickets?
Q. Was there any pickets there, about that place?
A. Yes, sir; tall pickets.
Q. Where was there any tall pickets?
A. Right around the fair yard.
Q. You swea' that, do you?
A. Yes, sir.
Q. Pickets?
A. Yes, sir.
Q. How large were they?
A. They were planks.
Q. They are broad planks, ain't they?
A. Tolerably broad.
Q. Broad planks set up endways?
A. Yes, sir.
Q. Could you see the roundhouse from where you were?
A. No, sir.
Q. And you could not see the fair ground?
A. I seen the fair ground all right enough, but I was on the outside of the pickets.
Q. What direction was you from the roundhouse?
A. I was west of it.
Q. How far from it?
A. I don't know.
Q. The stables are all west of the roundhouse, are 'hey not?

A. I don't know where the stables were.
Q. You told me a while ago you could see the race track?
A. Yes, sir; I said I could; but I meant when I was inside. I
55 didn't mean when I was on the outside.
Q. Were you out on the street?
A. No, sir.
Q. Were you back here in Severe's pasture?
A. I don't know whet'er I was or not. I never found out whose pasture it was or noth'ng of the kind.
Q. Were you in the pasture?
A. We had just drive' up there not long before that.
Q. You drove into the fair ground gate, didn't you?
A. Yes, sir.
Q. You hadn't driven out, had you?
A. No, sir.
Q. Doid you get a ticket the'e when you went in?
A. No, sir.
Q. How did you get in the'e without a ticket?
A. Because my husband was 'n officer and they let *ne* in.
Q. Did Bud Kell let you in?
A. Yes, sir.
Q. He was the gate keeper?
A. I don't know whether he was particular or not.
Q. He was there?
A. Ye', sir.
A JUROR. Did you see who fired that 'hot at your husband?
A. No, sir; I did not; there was so many people between us that I didn't see him.
(Witness excused.)

56 ELLA LONDON, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., t'e assist. dist. atty., and testified as follows, to wit:

Question. You' name is Ella London, is it?
Answer. Yes, sir.
Q. Where do you live?
A. Muscogee.
Q. Were you in Muscogee on the 27th day of last September, the day of that killing.
A. Yes, sir.
Q. Tell us what you saw of that killing?
A. Well, all I know about it, I just seen Mr. Smith when he did the shooting.
Q. Tell us about it?
A. The first shot at him, he missed him, 'nd the se*c*ond 'ime he struck him.
Q. Who was it he was shooting at?
A. At Mr. Welch.
Q. Go ahead.
A. Mr. Welch was coming across the str'et.

Mr. MARCUM.(of counsel for defendant):

Q. Who was?

The WITNESS. Mr. Marshqll was running up the stre't, came right up the street, and Mr. Marshall kept holloing a' Mr. Smith to halt, and Mr. Smith wouldn't halt, and Mr. Smith kept shooting at Mr. Welch as Mr. Marshal was carrying his pistols over the way [indica'ing] and kept holloing at Mr. Smith to halt, and he wouldn't halt, and Mr. Smith whirled around to shoot Mr. Marshal, and in that time Mr. Smith run.

Q. Did you see the first shot of Welch?

A. Yes, sir.

Q. Was Welch doing 'nything at the time he was shot about Charley Smith?

57 A. He wasn't doing anything, he was standing up then.

Q. How many times did *D*harley Smith shoot Welch?

A. He shot at him three times and hit him twice.

Q. Do you know where he hit him?

A. He shot him right below his p'nts band, and it came out down here.

Q. Shot him in the back?

A. Yes, sir.

Q. Where did the o'her ball hit him?

A. Hit him in the shoulder and lodged in this side of the jaw.

Cross-examination by Mr. THOS. MARCUM:

Q. Where were you standing?

A. I was standing between two boxes.

Q. Where we'e the two boxes?

A. Across on this side of the street, right in front of Mr. Welch's 'ent.

Q. On the street?

A. Yes, sir.

Q. Two boxes out on the tent street there?

A. Right there where these boys had these gambling places.

Q. That was the W*g*ite boys, wasn't it?

A. No, sir; it was colored people had these boxes there.

Q. What colored people?

A. I don't know who they were.

Q. You are pretty well acquainted with the colored people there, are you not?

A. Yes, sir; but I don't know all of them.

Q. Don't you k*j*ow the most of 'hem?

A. I know some of them. I don't 'now them all.

Q. How long had you been standing there between these two boxes?

A. I had been standing there a good while.

58 Q. What was going on at the two boxes?

A. The'e wan't anything.

Q. What were you doing there so long?

A. Standing there talking with some girls.

Q. What girls?

A. Some of my kin people from across the river.

Q. Who were they? Name one of them.

A. Dollie London was one of them.

Q. Where is she?

A. She is at Muscogee.
Q. Who else?
A. Myrtle King.
Q. Where is she?
A. She is in Waggoner.
Q. Who else?
A. That was all.
Q. There was three of you women talking there?
A. Yes, sir.
Q. Was there anything going on about the boxes?
A. No, sir.
Q. You said two men was carrying on something there?
A. No, sir; I said these men had that for a gambling box.
Q. They were not gambling?
A. No, sir. They had not opened up.
Q. Wha' time of day was it?
A. About half past eleven as near as I can come at it.
Q. Did you have a watch?
A. No, sir.
Q. How did you ascertain the time of day?
A. The people we'e fixing the tables for dinner.
Q. About how long had 'ou been standing at the boxes?
A. I hadn't been standing there very long.
59 Q. You said awhile ago you had been there some time.
A. No, sir; I didn't; you misunderstood me. I said I had been standing there a good little while, but not very long.
Q. A good little while, but not very long?
A. No, sir; I hand't been standing there very many minutes.
Q. Where did you go from to that place?
A. From back in the fair ground.
Q. Did you go from the merry-g'-round?
A. No, sir; I didn't visit around that.
Q. Wasn't you on the merry-go-round when the shooting occurred?
A. How could I be at the me'ry-go-round and standing between tow boxes. I wasn't there at the merry-go-round.
Q. Did you see Bynum Colbert's wife.
A. No, sir.
Q. Did you see any other woman than you have named?
A. They was a lot of people around there, but after this shooting was done they were running.
Q. Did you see any other women except these two you were with?
A. That is all the ones there was the'e.
Q. Don't you know that that street was filled with wagons?
A. Not at that time it wasn't.
Q. Wasn't old man Newlin in the gate with his wagon just before that?
A. I wasn't noticing the gate.
Q. Didn't Newlin drive in there with some chickens?
A. I don't know anything about it. I wasn't notic'ng that particularly.
60 Q. You had been there some time.
A. Well, I wasn't noticing what the men were doing.

Q. You could not stand on a little narrow street like that and a wagon pass and you not kno' it.

A. I know that, too.

Q. Did any wagon pass?

A. I don't know what passed. I was talking with the women; the wagon might have been in there when I went in there.

Q. Wasn't the wagon there when the shooting took place?

A. The wagon was about the gate then, I guess.

Q. Was it at the gate?

A. I didn't see it. Man, I was sca'ed.

Q. Why do you guess it was at the gate if you don't know?

A. I never noticed; I tell you I was scared.

Q. The'e was nothing to scare you before the shooting?

A. No, sir.

Q. Just before the shooting wasn't there wagons there?

A. I don't know what was there. Th're was lots on the outside of the street.

Q. I am talking about this street running down between these streets.

A. Yes, sir; I know what you mean.

Q. Then answer me.

A. I am not positive about 'he wagons being in there then, for I wasn't noticing them.

Q. Don't you kn'w there was wagons all along there?

A. I wasn't noticing.

Q. Then you could not have seen John Welch's tent if there had been a wagon there?

A. There was no wagon in front of Mr. Welch's tent.

61 Q. Don't you know that a wagon drove just at the shooting, and wasn't there carriages and buggies just at the shooting?

A. When these people drove up they would drive on around; they wouldn't stop them in the street.

Q. Enough said. Then you never saw any wagon or carriage just before the shooting?

A. I saw lots of them, but they were on the outside.

Q. I mean inside of the tents.

A. They were not inside of the tents that I know of.

Q. I mean inside of 'he tents in the front row. Did not you see wagons and buggies drive in there?

A. I had seen them.

Q. Just before 'his 'hooiting?

A. I wasn't paying any attention at the time.

Q. Will you swear there wasn't any there?

A. I couldn't swear it, because I wasn't paying any attention.

Q. What did you see?

A. We were talking about something else, and I wasn't noticing about the wagons and things.

Q. What was 'he first thing that attracted you' attention?

A. That shooting.

Q. What sho'ting?

A. When Mr. Smi'h shot Mr. Welch.

Q. Whe'e was Smith standing?

A. He was right in fronot of Mr. Welch.
Q. Where was Welch?
A. Standing in front of his tent.
Q. They were both in fron' of Welch's tent. Where was Charlie's tent?
A. Right beside of Welch's tent.
62 Q. They were shooting towards you then?
A. You bet they was.
Q. Did you hear the bullets?
A. No, 'ir; I never; I was scared, man.
Q. Did you see where they struck?
A. No, sir; I seen after it was all over. I could not see nothing 'he'.
Q. The first one didn't hit. You must have seen that?
A. The first shot scared me.
Q. That is the one you say which didn't hit Welch?
A. No, sir; it di'n't hit him; the secon' time it did.
Q. How do you know it didn't hit him the first time?
A. If he had hit him the first time he would have shot him in the face, and the second shot Mr. Welch whi*l*red and tha' made him shoot him in the shoulder.
Q. I thought you told me a minute ago that you' attention was at'racted by the first shot. The shooting was over when you looked 'hen?
A. It wasn't over. I was looking——
Q. Didn't you tell me a moment ago that you was attracted by the shooting at first, and that *d*caused you to look?
A. When he first sho' you know——
Q. How do you know it was po'*j*ted at his face if you didn't see the first shot until after it wa' fire'? You don't know where the pistol was pointed, do you?
A. I don't know where it was pointed, but it was pointed towards him. If it had been pointed down this way it was bound to strike him.
63 Q. I am not asking you what 't was bound to do. Did you tell me a minute ago that the first shot attracted your attention? What do you mean by attracting your attention?
A. I say at the first shot I got scared.
Q. You were talking to these gir*sl*, you said.
A. I know, Mr. Marcum.
Q. Were you not?
A. I was talking to these girls, and these g*a*irls says there is going to be a fuss, *and these* and I says I don't guess it is.
Q. And you kept 'n talking?
A. Yes, sir.
Q. Your back to them?
A. No, sir; I had my back against that house.
Q. And then whe' the shot fired you looked up, but not before?
A. I was looking everywhere.
Q. You said when the shot fired you looked up.
A. Let me tell you, Mr. Marcu'. When that first shot fired I was looking at them, and Mr. Welch was standing there, and if I hadn't been looking at him I wouldn't have seen him when he whirled.

Q. How long have you been living in Muscogee?
A. 15 years.
Q. Where do you live?
A. I live down below the Catholic church.
Q. Who do you live with?
A. Papa.
Q. Who?
A. Ed London.
Q. What is your business?
A. Washing and ironing and cooking out.
64 Q. Have you been talking with Bill James about this?
A. I never talked with anybody about it.
Q. Nobody at all?
A. I ne'er talked with anybody about what I see.
Q. You never talked to anybody in your life about it?
A. I never told anybody what I see and they didn't tell me what they seed.
Q. When did they summon you?
A. It has been two weeks.
Q. You were here at the 'ast term of the court, were you not?
A. Yes, sir.
Q. That is mo'e than two weeks, isn't it?
A. I have been summoned twice. I was down here twice.
Q. And you never told anybody about what you of 'his matter?
A. That would't have made it any better.
Q. Don't you know that you wasn't there at all and all you have said here is waht you have been told?
A. No, sir.
Q. How many shots did Marshal fire?
A. His pistol went off twice up in the air.
Q. Twice up in the air?
A. Yes, sir.
Q. Show me how he was holding his pistol?
A. When he fell off the horse——
Q. I am not talking about when he fell off the horse. What was he doing before?
A. He was holloing halt.
Q. And then shot?
A. He was shooting up in the air.
Q. How did he hold his pistol?
(Witness indicates.)
65 Q. That is not much up, is it?
A. It is bound to be up if he was o' his horse.
Q. He was up on his horse. That is what you mean?
A. He shot up that way. He didn't shoot at Mr. Smith. If he was shooting at Mr. Smith when these people were 'unning he was bound to hit somebody.
Q. When he came up and halted Smith he fired up?
A. He fired right over them taht way [indicating].
Q. He came up and halted Smith and fired over him, and them Smith fired at him?

A. When he holloed halt Mr. Smith whooped, and turned around and pulled 'he trigger, and Marshal fell, throwed his hands on his pistol, and it went up in the a*ur* that way*L*. That is one time it went off. The other time, though, he shot over the crowd.

Q. Was that before he holloed halt?

A. He holl'ed halt a dozen times before pistol ever went off.

Q. When he holloed halt Smith fired, did he?

A. That is what he done.

Q. Who fired first?

A. Mr. Smith fired 'he first shot—no, Mr. Smith didn't. Mr. Marshall said halt five or six times when he was going right through the crowd, and then he shot the pistol off, and the *the* next time Mr. Smith turned around and whooped and shot Mr. Marshall.

Q. Marshall did fi'e the first shot, then?

A. Mr. Marshall fired over the crowd his first shot, and then when he was falling off his horse he clinched his hand on his pistol.

Q. And it went off as it went down? Did he *sg*trike the ground before——

66 A. I don't kno' whether he struck the ground or not. People was running in ever' di'ection.

Q. You don't know whether he struck the ground or not?

A. I know he left the horse.

Q. Was Charley running from him whe' he holl'ed halt?

A. Smith was not running. He never run until after he done shot Mr. Marshall.

Q. Do you know wh*ay* he was holloing halt? Why was he telling him to halt if he wasn't ru'ning? Wasn't he shooting at the other man? He had already shot three tiemes at Welch.

A. And then he shot at Marshal.

Q. I am not talking about Marshal. You *he* said he shot three times at Welch, and then Marshal came up and holl'ed halt?

A. I know it.

Q. And Smith was standing there then?

A. No, sir; Mr. Marshall just done that way [indicating], and was walking across the street, and Mr. Smith was walking behin*g* him. That is the way it was.

Q. You said Smith was standing still when M'rshall said halt?

A. He was still following this man up, shooting him. As soon as he shot him the man walked off and just kind of drawed up.

Q. He was shooting in rapid succession, wasn't he?

A. He was shooting close to him. Just like hitting on a box.

Q. Just that way [indicating by clapping hands together rapidly]?

A. It was a little louder than that.

Q. Then, while he was firing these three shots Marshall halted him eight or ten time'?

67 A. At the second shot Marshal commenced halting Mr. Smith, and Mr. Smith was walking. Mr. Smith never run.

Q. You stated that Marshal holloed halt eight or ten times.

A. Five or six times, and then he shot up over the crowd; he was holloing halt all the time he was going through th' crowd.

Q. How long have you been living in Muscogee?
A. 15 years.
Q. Where do you live?
A. I live down below the Catholic church.
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Q. You stated that Marshal holloed halt eight or ten times.

A. Five or six times, and then he shot up over the crowd; he was holloing halt all the time he was going through th' crowd.

Q. And he was holloing halt five or six time', as you have got it, while Smith was firing only one shot; Charley was looking at Marshal while he was holloing halt. Was Smith's back to Marshal?

A. Yes, sir.

Q. Are you married?

A. No, sir; my husband and I are parted.

Q. How many husbands have you?

A. I have not been married but twice; one of them is dead and one living.

Q. You lived with another fellow, didn't you?

A. No, sir.

Q. Did you live with another man besides your husband?

A. No, sir; I didn't.

Q. Don't you keep a sporting house there?

A. No, sir; I don't keep it down to papa's.

Q. Where do you keep it?

A. I don't keep 't at all.

Q. Why did you say you didn't keep it at your papa's?

A. I said if I kept I was bound to keep it at papa's, because I stay there.

Q. You don't keep it there?

A. No, sir; I don't keep that kind of a house.

Q. You are certain about that?

A. I have got one husband dead and one living, and when I get so I can't work for a living I can go back to him.

68 Q. He will take you back at any time, of course?

(No response.)

(Witness excused.)

69 JOHN JACOBS, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., and testified as follows, to wit:

Question. Your name is John Jacobs, is it?

Answer. Yes, sir.

Q. Where do you live?

A. I live on Pecan Creek, the other side of Muscogee.

Q. Were you at Muscogee on the day of the killing?

A. Yes, sir.

Q. Tell us what you saw of it?

A. I sa' Charley Smith walk up and down this street moving wagons and hacks out of the way.

Q. Did you see him do anything to Newlin's wagon?

A. I seen him catch hold of th' old man's hack and lead it out of the gate and turn it loose outside of the gate and come on back in. When he was coming in I went down by the tent, and as I was coming back I come by his tent.

Q. You came by whose tent?

A. Charley's tent; I came right against his tent door. When I came there I met him at the door with his six-shooter in his hand. I stepped back then and he ste'ped right out; *i* I stepped back and went this way [indicating], and he went *f*roward, that way like, *a* a*m*d I saw he was look-

ing for som'thing or somebody, and I stood there watching, and I seen John Welch come along and he spoke to him, but just what he
70 said I don't know; I didn't hear goo'.

Q. Who spoke?

A. Charley Smith spoke. When he spoke I seen him throw up, and and when he throwed up John Welch throwed his side to him—turned that way to him—and he shot and missed him the first shot; the second shot he still remained that way, and he shot him right a'out here [indicating]. John stood that way looking right at him, and finally he turned his head and he turned his back to him, and he shot again. Then is the time he shot him in the back where it co'e out below his knee.

Q. How was Welch dressed?

A. He was 'n his shirt sleeves.

Q. Did you see any pistol about him?

A. No, sir; I didn't see it if he 'ad any.

Q. Or a knife?

A. No, sir.

Q. You don't know what Charley Smith said to him when he came up there?

A. No, sir.

Q. Did Welch say anything to Smith?

A. I don't know whether he did or not.

Q. After the third shot what did Smith do?

A. When he done the last shooting towards John, Robt. Marshal ran up behind him and he said something to him, and I don't know whether he shot or not; but, any way, I heard him say, "God damn you, what have you got to do with it? Do you want some of it, to'?" When he said that he shot, and the shooting was right towards me, and I got excited and I run. I was standing against the tent, and I run in the tent
71 and run on 'he oustside and went south and went around there; and when I went around there Robert was coming leaning on his horse that way [indicatin'].

Q. Charley Smith said: "God damn you, what have you got to do with it. Do you want some of it, too," and then you heard a shot fire'?

A. Yes, sir.

Q. Did Smith fire that s'ot?

A. Ye', sir.

Q. After making tha' statement he fired that shot?

A. Yes, si'.

Q. Did you see the man at t'e time at who' he fired?

A. I see it was Smith that done the firing.

Q. Did you see the person tha' he was firing at?

A. Yes, sir.

Q. Who was it that he was firing at?

A. Robt. Marshal.

Q. Was Robt. Marshal on horseback or on foot?

A. He was on horseback.

Q. Smith was on foot?

A. Yes, sir.

Q. Did you see where Marshal was shot?

A. I didn't see it.

Cross-examination by Mr. THOS. MARCUM:

Q. Wha' time of day was this shooting?

A. As near as I ca' get at it I guess it was between nine or ten o'oclock in the morning.

Q. How long had you been in ther'?

72 A. I had been in there from 'he first day of 'he fair.

Q. How long had you been in there that morning?

A. I stayed right there.

Q. Who with?

A. By myself with my wagons and hacks.

Q. Did you have a wagon or hack there?

A. Yes, sir.

Q. In be'ween these tents?

A. No, sir; outside, but I was running a hack there.

Q. Where was your wagon?

A. It was outside, but I was inside.

Q. Inside of where?

A. Where the folks was selling thing' and where the swings and everything was.

(Witness is shown diagram.)

Q. You know where the east and west street is that runs by the fair ground?

A. Ye', sir.

Q. On that street there is a large gate right next to the fair ground lot, isn't there?

A. Yes, sir.

Q. That goes in between these tents, don't it?

A. Yes, sir.

Q. You know whe'e the roundhouse i'?

A. Ye', sir.

Q. And t'e race track is down there south of that?

A. Yes, sir.

Q. And the grand stand is along here near the roundhouse, or a little east of it?

A. Yes, sir.

Q. You remember the west fair ground fence?

A. Yes, sir.

Q. What sort of a fence is that?

A. It is a wire fence.

73 Q. As you go from Muscogee you are goind east then to the fair ground, are you not?

A. Yes, sir.

Q. When you get tho this gate where the fence is, you turn directly south to go in between them?

A. Ye', sir.

Q. And it was in there 'omewhere that your wagon was?

A. My wagon was right in this corner here [indicating].

Q. Outside on the s'reet?

A. Ye', sir.

Q. How far from the picket fence w're you?

A. About 30 steps, 30 or 40.

Q. Right acorss 'he street fr'm the 'icket fence?
A. No, sir; right king cornering.
Q. You were down there towards Mintor's?
A. Yes, sir.
Q. Right on the open street?
A. Yes, sir.
Q. There is a tall plank fence that runs from this northwest corner of the fair ground down south, isn't there?
A. Yes, sir.
Q. Eight or ten feet tall, isn't it?
A. Yes, sir.
Q. And then there is three large stables right along on that line running north and south, isn't there, where they keep their fine horses?
A. Yes, sir.
Q. You know where they are?
A. Yes, sir; I have an idea where they are. I never worked in there.
Q. Y'u know where they are, do you not?
A. Yes, sir.
Q. Didn't you ever go in there?
A. I have went in t'ere. There are stables sure enough along that line.
74 Q. In between these tents there is a big ditch outside the fair ground, and in this tent lot running along down by that fence?
A. Yes, sir.
Q. A deep ditch?
A. Yes, sir.
Q. The tents are on the west of that ditch, are they not?
A. Yes, sir.
Q. Your wagon was over her' across diagonally on the north side of the street from the ticket office?
A. Yes, sir.
Q. Where were you when the shooting took place?
A. I was down here [indicating].
Q. Do you know where the merry-go-round is? Wasn't there a merry-go-round west of tha lot where all of these tents are?
A. Yes, sir.
Q. The fair ground is on the east side of this tent lot, isn't it?
A. I never no'iced that much, but it wa' 'his way some way [indicating]
Q. You know this merry-go-round wasn't on this tent street?
A. No, sir.
Q. Wasn't west of it next to town?
A. Yes, sir; it was.
Q. Were you near to the merry-go-round?
A. I did not get right down to the merry-g'-round.
Q. You had started to the merry-go-round?
A. Yes, sir.
Q. How close to the merry-go-round did you get before you turned and went back?
75 A. I was only five or six step' from the merry-go-round.
Q. W'at turned you back?

A. I just turned back because my hack had went off and I had been looking and looking, and it never did come, and I thought I would go out and look for it? I was aiming to go out and look for it.

Q. What did you start to the merry-go-round and get in five or six steps and then turn and go back for?

A. I just don' it to be walking, I suppose. People were just stirring all the time. I guess I was walking because I was tired of standin'.

Q. Did you need exercise?

A. I suppose so.

Q. Did you?

A. It must be.

Q. What did you have the'e in your wagon?

A. I had some corn and hay and one thing and another in there.

Q. When you turned back there—show me what direction you went back.

(Witness indicates on diag'am.)

Q. Out of that s'reet, and out of the front gate?

A. Yes, sir.

Q. You wnet by yourself when you wal'ed off?

A. Yes, sir.

Q. Where were you when you saw the shooting?

A. I was right against the tent.

Q. What did you do then?

A. When I saw them I stepped back a few steps from his door.

Q. Charley's Smith's tent?

A. Yes, sir.

Q. Did you see anybody else in the tent?

76 A. No, sir; I didn't see anybody else in there because I stepped back.

Q. The front of his tent was open, was it?

A. It was open, but there was partitions, and you could not see everybody.

Q. But the fron' part of his tent was all open, wasn't it?

A. It was open, but I didn't see anyone but him. As I saw him I stepped right back and I didn't see anybody else.

Q. There was a counter run across his tent, wasn't there?

A. Yes, sir.

Q. There was a counter run across the fronot of John Welch's tent, wasn't there? How far was Welch's tent from Smith's tent?

A. I believe they were about as far apart as those chairs back there [indicating about 40 feet].

Q. The doors?

A. Yes, sir; as near as I can get at it.

Q. When y'u saw Smith start out of his tent where was Welch?

A. I di'n't see him at all. When I went donw the street I didn't see him.

Q. You pass' along, didn't you?

A. Yes, sir; I passed on going on tow'rds the swing.

Q. Then you trned back again?

A. Yes, sir.

Q. Then your back was to Welch and Sm'th both after you turned around and started south?

A. Yes, sir.

Q. Then you started the second time to the merry-go-round?

A. Yes, sir.

Q. How far did you get that time?

A. I went about five or six steps of the me'ry-go-round.

77 Q. The second time?

A. No, sir; I just started once down there.

Q. I have had you down there in five or six steps, and then you come back and told about Charley having a pistol there at the tent, and then I asked you where Welch was and you said you didn't see him, and then you turned around and started off again. What became of you, anyhow?

A. I don't understand you. I didn't went but once down there. I didn't make two trips down there.

Q. It was on your return from the merry-go-round that you saw Smith with the pistol? Where was Welch at that time?

A. When I saw Welch he was right in fronot of Charley Smith's, when I was on my way back.

Q. How far was Welch from Charley at that time?

A. I can't tell you just how far, but it was pretty close.

Q. Welch and Smith then were facing each other?

A. Yes, sir.

Q. What did you state to the jury a while ago for that Smith seemed to be looking for somebody when he came out when you say now you saw Welch right in front of him?

A. There was people in front of him. The street was thick with people, and when he came out he was looking right up the street, and I seen he was after something; I seen he wasn't satisfied and I got kind of bothered and stepped back.

Q. W'ere did you step to?

A. I stepped backward from the door w'ere I met him at.

78 Q. And then you backed sout?

A. No, sir; I didn't go nowheres; I just stepped back and stood there. I stood there, and when he saw him he spoke, but what he said I don't know.

Q. You were right close to Charley?

A. I was pre'ty close on him, but the wind was blowing and I couldn't hear. The wind was high.

Q. The wind was high?

A. Yes, sir.

Q. Dodn't you know there wasn't a particle of wind that day—that the weat'er was very fair a'd warm?

A. It was windy every day of that fair.

Q. It was warm weather, wasn't it?

A. Yes, sir.

Q. Did he shoot through the crowd at Welch?

A. He didn't shoot through the crowd, for he didn't shoot anybody else. When I saw Welch and him they were fa'ing together, and I didn't see anybody else in between the' when he shot. I saw lots of people to the sides of them.

Q. Welch was looking at Smith and Smith was looking at Welch, and Smith had a pistol and Welch was advancing on him at that time, wasn't he?

A. 'es, sir.

Q. And then Smith fired the first shot?

A. Yes, sir.

Q. And then the next and then the next. Three were all he fired. That is right, is it?

A. Yes, sir.

Q. Those shots were fired one right after another, quickly, were they not?

A. Yes, sir.

Q. And that is all he fired at Welch?

79 A. That was all that I know of.

Q. Then where did Welch go?

A. He s'arted 'ack, but wheih way he went now I am not able to say. When I found him in the sathd, because I got excited and I got to running myself.

Q. Did you run after he fired 'he three shots?

A. Yes, sir; after he fired the three shots and fired one more shot besides. That shot was back tow'rds me, that is the time I run.

Q. You could stand to see three shots, but you could not stand the fourth?

A. Yes, sir.

Q. Where did you go to?

A. I run, but I don't know where I went.

Q. The fourth shot went over you?

A. Yes, sir.

Q. Where was the marshal?

A. When I run in the tent and out of the 'ent on the so'th end I met him lea'ing on his horse halting right beside him.

Q. Where was Marshal when the shot went over your head?

A. I didn't say it went over my haed. I said the fourth shot went towards me and I was south. I was on this corner and Robt. Marshal was on that street there.

Q. Where were you?

A. Off about five feet from him.

Q. Didn't you see Robert?

A. Yes, sir.

Q. Was he south or north of you?

A. He was south.

Q. What was he doing at that time?

A. He was talking to Charley.

80 Q. What did he say?

A. I heard him say, Quit shooting that man and throw up you' hands.

Q. How often did he say that?

A. I don't know.

Q. He had already quit shooting at Welch?

A. Yes, sir.

Q. And Marshal was telling him to quit?

A. Yes, sir.
Q. Then there was nothing to quit, was there?
A. Yes, sir; but I don't know how it was.
Q. You were not there at*t* all, were you?
A. I was right there.
Q. How many times did Marshal fire at Smith?
A. I don't know of but one shot. It is my belief he fired one shot.
Q. Did you see him f're at Smith?
A. Well, he had his six-shooter in his hands.
Q. He shot, did he?
A. That is my belief about it?
Q. Didn't you see him shoot?
A. I can't say.
Q. Didn't you run towards Marshal.
A. Yes, sir; I run in the tent I was standing by and went through and come around.
Q. Marshal was on his horse, a'd you saw him shoot, didn't you?
A. Yes, sir.
Q. You saw him shoot down at Smith?
A. Yes, sir.
Q. Did he have his pistol elevated down that way at Smith?
A. When I saw that man with his pistol *ti* was up this way [indicating].
Q. That is the first time?
A. Yes, sir.
Q. When he shot, though, he had it on Smith, didn't he?
81 A. The*y* is just what I don't know. When I saw him he had it in hi' hand, holding it up this way.
Q. You just now said he s*g*ot.
A. He must have shot.
Q. Didn't you see him shoot?
A. No, sir; but I heard the report of the gun.
Q. Then you didn't see him shoot at all?
A. I heard the report of the gun, but I could not te'l. I was scared.
Q. How many reports from Marshal's pistol did you hear?
A. I took it to be one that I heard.
Q. Did you hear one or two?
A. I am telling all I know, but I didn't hear but one.
Q. Did you hear any after you got away?
A. I didn't move yet when I heard his 'eport.
Q. You said awhile ago*u* you run at the fourth shot of Charley's pistol.
A. Yes, sir.
Q. W*g*ere did you go to?
A. I run back in a little tent.
Q. You didn't see any mo'e, did you?
A. No, sir.
Q. What are you talking about Marshal shooting, then, if you were in a tent and couldn't see him?
A. What is that you say?
Q. I have got you in the tent now. I have got you hemmed in. Where was Marshal?
A. I don't expect to te*l*l nothing more than I know.

Q. You were in the tent when Smith fired the last time?

A. No, sir.

82 Q. Didn't you say awhile ago that when he fired the fourth shot you couldn't stand it any longer and you run?

A. The fourth shot, of course, I run.

Q. Then he didn't f're any more after that, did he?

A. I*d* he did I don't know it.

Q. Who fired that fourth shot? Did you see it?

A. I didn't see it, but I heard the report of the gun.

Q. Wasn't there another shot fired after you got into the tent?

A. I didn't stay in the tent; I run out of the te't.

Q. After you run out, then?

A. I don't know what I heard or what I done then.

Q. Then y'u never saw but three shots?

A. Yes, sir.

Q. And heard 'he fourth?

A. Yes, sir.

Q. You are certain about that, are you?

A. Yes, sir.

Q. No doubt about it?

A. That is right, I suppose.

Q. Had you got in the tent when the fourth shot was fired?

A. Yes, sir.

Q. Now, when was it you saw before that the pistol pointed by Marshal a' Smith. Now, we have got you in the tent when the fourth shot was fired. Wasn't it before you went in the tent?

A. Yes, sir; I guess so. You have got me kind of winded up some way.

Q. Got you wound up?

A. Yes, sir.

Q. You can go and wind yourself down awhile. I suppose you never did see your wag*a*ons any more?

A. N*o*, sir; I never saw them until it was all over.

83 Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Did you see Smith when he was running away from ther'? Do you know anything about how he got away?

A. No, sir; I don't know anything about it.

Mr. FREDERICK (of counsel for defendant):

Q. You don't know hardly how you got away yourself, do you?

A. No, sir; I don't know hardly.

(Witness excused.)

84 PRINCE LOWRY, having been duly sworn upon behalf of the Government, was examined in chief by the assistant district attorney, Mr. J. B. McDonough, and testified as follows, to wit:

Question. Your name is Prince Lowry, is it?

Answer. Yes, sir.

Q. Were you at Muskogee at the fair grounds on the day of the shooting of John Welch and Robert Marshal?

A. Yes, sir; I was there.
Q. Did you see Charley Smith?
A. Yes, sir; I saw him.
Q. Did you see him get a pistol?
A. Yes, sir; I seen him get a pistol.
Q. Go on, now, and tell us what you know about it. What were you doing at the time he got the pistol?
A. I was standing in a tent there talking to this man Gentry when he got it.
Q. Which Gentry?
A. Scott Gentry.
Q. What did Charley do?
A. I seen him take the pistol*d*, and I told Gentry, "Smith has got your pistol."
Q. How did Smith take the pistol? Where was it when he got it?
A. He had it on his side here.
Q. What was it in?
A. In a scabbard.
Q. Was Gentry's back or face to Smith at the time Smith got the pistol?
A. Gentry's face was to me.
Q. And his back was to the other man?
A. Smith came up on his side.
Q. What did Smith say when he took the pistol?
A. He didn't say anything that I heard.
Q. How far was it from John Welch's tent?
A. I don't know.
85 Q. You did not hear Smith say anything at all?
A. No, sir.
Q. What was it you said to Gentry?
A. I just told him that he got his pistol, is all I told him.
Q. What did Smith do after he got Gentry's pistol?
A. He went on out of the tent.
Q. Did you see any of the shooting?
A. No, sir; I did not see any of it.

Cross-examination by Mr. THOMAS MARCUM:

Q. You saw none of the shooting? Where had you been?
A. I had been up town, when I went into the camp there.
Q. What did you go there for?
A. I went in there to talk with Gentry.
Q. Did you talk to him?
A. Yes, sir; I was talking to him.
Q. What were you talking about?
A. I was talking about some hay.
Q. When Charley got the pistol?
A. Yes, sir; me and Gentry was talking about some hay.
Q. You never saw or heard any of the shots, did you?
A. I heard the shooting, but I never seen any of it.
Q. Where were you when the shooting took place?
A. I was in the tent there.
Q. That tent?

A. Yes, sir.
Q. How many shots did you hear?
A. I heard about four or five shots, I reckon, to my recollection.
Q. Did you hear the shots south of you?
A. No, sir.
86 Q. In what direction was the shots from you?
A. They looked like they were out towards the north, as far as I could think of.
Q. Do you know anything about it?
A. No, sir; I don't know nothing about the shooting.
Q. You can tell nothing about the direction?
A. Well, when I first heard it it looked like it was out towards the north when I heard the shooting.
Q. Well, was it?
A. Yes, sir.
Q. How do you know?
A. That is the direction I heard it. I didn't see it, but I heard it.
Q. That is, the first shooting?
A. Yes, sir.
Q. You heard more shooting, didn't you?
A. No, sir; I could not tell; there was so much noise I could not say any more how many shots.
Q. How many shots did you hear?
A. I heard four or five shots, I reckon.
Q. Well, but the first shooting; there was only three fired first, was there not?
A. Yes, sir.
Q. And then immediately after the three, or soon after, there was two more, was there not?
A. Yes, sir.
Q. I will ask you at the time this shooting began there if this tent street did not have wagons in it; if it wasn't filled up with wagons; this street between those tents; wasn't there wagons in there?
A. I didn't see that.
Q. You didn't see any at all?
A. No, sir; I didn't went out of the tent at all.
Q. Was there any in that street?
A. I suppose so.
Q. Well, was there?
87 The COURT. He says he does not know.
Mr. MARCUM (of counsel for defendant). It was very narrow. You were looking north?
A. I didn't see; I didn't came out of the tent.
Q. How long did you stay in there?
A. I stayed in there until everything was over. I don't know anything about what was going on out doors.
Q. As soon as it was over you went out, didn't you?
A. Yes, sir.
Q. The shooting was over in less than half a minute, was it not?
A. Yes, sir; but I didn't go out until a good bit afterwards.
Q. You never saw any wagons then, did you?

A. Awat afterwards there was some hacks came in there.
Q. Hacks came in afterwards?
A. Yes, sir.
(Witness excused.)

88 SCOTT GENTRY, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, the assistant district attorney, and testified as follows, to wit:

Question. Your name is Scott Gentry?
Answer. Yes, sir.
Q. You live at Muskogee?
A. I live at Choska.
Q. Were you at Muskogee on the day of the killing of John Welch and Robert Marshal?
A. Yes, sir.
Q. Did anybody take your pistol away from you that day?
A. Yes, sir.
Q. Before that killing?
A. Yes, sir.
Q. Is this your pistol [exhibiting a white-handled pistol]?
A. Yes, sir; that is it.
Q. Did anybody take it away from you?
A. Yes, sir; it was taken out of the scabbard.
Q. Just go on and tell about it.
A. Charley Smith was said to be the man that took it. I didn't see it. He came up behind me, and the pistol was hanging back, right here, and I had my coat off and just my vest on, my coat hanging across my arm, and I felt something touch me behind, and Prince Lowry was standing talking to me, and he says, "He has got your pistol; he has got your pistol," and I says, "Who?" and he says, "Charley Smith," and I wheeled, and by the time I wheeled around he was out of sight. There was a place planked up in there, kind of a stand, restaurant, or lunch stand in there, and he run around behind that before he shot anyone, and I could not see him at all.

89 Q. You did not see him at the time he first fired?
A. No, sir.
Q. Did you see any of the shooting?
A. No, sir; I didn't see any of it at all. It was behind that plank wall from me.
Q. They had some planks put up?
A. Yes, sir; a wall; and the front of it was something—a wagon sheet or something hung up, and just left space for a door like, and then right back at the other end was a tent stretched, made kind of a room like, and I was standing just right in the inside of the tent, and he went right out the pass way through this part that was planked up.
Q. Was your pistol loaded at the time?
A. Yes, sir; five loads in it.
Q. Did you get it back that day?
A. No, sir; I never got it for sometime afterwards. It was carried to the agent's office.

Q. When you got it back how many loads did it have in it?
A. There was no loads in it at all.
Q. From whom did you get it?
A. Col. Wisdom, the agent, told me that there was a marshal carried it there?
Mr. MARCUM (of counsel for defendant). Don't tell what they said.
The COURT. Was your pistol in your scabbard?
The ASSISTANT DISTRICT ATTORNEY. The scabbard was on him around here. You did not have any coat on?
A. No, sir.
Q. And the pistol was sticking in this scabbard?
A. Yes, sir.
Q. Is this your scabbard [exhibiting]?
A. Yes, sir.
Q. That was around your body, and you felt somebody or some'hing jerk the pistol out?
A. Yes, sir.
90 The COURT. You did not see anybody take it out, but you felt it jerk?
A. Yes, sir; he came up right behind me, and by the time I turned—sprung out—he went right behind that plank——
The COURT. You then observed your pistol was gone when you turned?
A. Yes, sir.
The ASSISTANT DISTRICT ATTORNEY. Were you an officer there?
A. Yes, sir.
Q. What kind of an officer?
A. Indian policeman.
Q. United States Indian policeman?
A. Yes, sir.
Q. Do you know whether or not Robert Marshal was acting as an officer that day?
A. Yes, sir.
Q. How long had he been acting as an officer in that country?
A. Well, I could not tell you exactly. He had been acting for a long time; several years.
Q. Acting as United States Indian police?
A. Yes, sir.

Cross-examination by Mr. THOMAS MARCUM:

Q. When did you get your pis'ol back?
A. I could not tell you just exactly.
Q. About how long?
A. It was about two weeks before I got it back. I went down in a few days and it was locked up in a safe, and the Colonel's son had gone off, and he was the only one that could get it out, and the Colonel told me I would have ti wait, and in about two weeks or a little over I got it.
Q. You got it from Col. Wisdom, you say?
A. Yes, sir; from his office there?
91 Q. Did you remain there in the tent? How long after the shooting was over did you remain there in the tent?
A. Just as soon as it stopped I went out. That was in a little bit.

Q. That wasn't but a few minute', I suppose?

A. It was just in a moment's time. Just as that fellow got shot at the gate I stepped out.

Q. It was all over in half a minute?

A. Yes, sir; just a little time.

(Witness excused.)

92 GEORGE TRIGS, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant distric' attorney, and testified as follows, to wit:

Question. What is your name?

Answer. George Trigs.

Q. Where do you live?

A. In Muskogee, six miles on the other side; or eight.

Q. Do you know the defendant, Charley Smith?

A. Yes, sir.

Q. Did you know Robert Marshal?

A. Slightly acquainted with him.

Q. Did you know John Welch?

A. Yes, sir.

Q. Were you at the fair grounds or out where that killing took place last September, near Muskogee?

A. Yes, sir.

Q. Did you see the beginning of the shooting?

A. I saw the first shooting.

Q. Tell us what you saw.

A. The first thing that drew my attention was Mr. Smith running, or going in a hurry down to the tent, in which he went in, and I kept my eyes on him, and I seen a little boy, one of my school boys, jump out, and I still looked over there to see what was going on, what was going to happen; and he came out, and after he come on the outside he seemed to have the pistol like this way, turning it over like, and looking around for something, and I could not see who it was, and saying that he was going to do something. When he said he was going to do something I heard Welch say, "Why don't you do it, then?" and as quick as
93 that he fired the first shot. Welch turned, and he shot the second time, and then the third time, and that is the last I seen of that.

Q. Was Welch doing anything while the other man was firing?

A. I didn't see him doing anything. He only turned around and walked away. It seemed that he lost all nerve at that time.

Q. How far were you from them?

A. I suppose as far as from here to the other side of the room. I was on one side of the street, and this was on the other. I was sitting in the shed there, at least.

Q. What did Charley Smith do then?

A. I could not tell you. That is the last I saw him, when he shot the last shot.

Q. You did not see the killing of Marshal?

A. No, sir.

Q. How far apart were Smith and Welch at that time of the first shooting?

A. I think it must have been about three or four feet they were apart. About four feet, I would say.

Q. Did you see the body of Welch after he was killed?

A. Yes, sir.

Q. Where was he shot?

A. He was shot once—I saw a mark here on his shoulder, and in here, and then the one that came out here.

Q. The one that went through the body went in where?

A. In his back.

Q. And came out in front?

A. Yes, sir.

Cross-examination by Mr. C. J. FREDERICK:

Q. Went in the back or in the hip?

A. Back. I mean behind. About through the waistband of his pants.

94 Q. The waistband goes all the way around?

The COURT. Show where it went in. That is the best way to do it.

The WITNESS. Right in here [indicating on side of back], as well as I remember. I never examined him closely.

Mr. FREDERICK (of counsel for defendant). Which side?

A. He wasn't shot in the side.

Q. Was he shot right straight through the center of the backbone?

A. I never examined him closely.

Q. I thought you said you had examined him closely?

A. I said I did not.

Q. I misunderstood you, then. It was one side or the other of the backbone?

A. I suppose so, but I didn't examine it.

Q. Was it between the backbone and the hip?

A. I didn't examine it at all.

Q. You didn't?

A. I didn't examine it to find out.

Q. It wasn't in the center of the backbone, was it?

A. I didn't examine to see whether it was right in the center or not.

Q. What is your best recollection about it?

A. My best recollection was somewheres near his waist, or small part of his back. I don't know on which side, or how far from the backbone, or anything further; but I just saw him lying on the bed——

Q. Could you tell whether it came in at the back and went out at the front, or went in at the front and came out at the back?

A. I could tell from the way the shooting was going on.

Q. From examining the wounds? Did you see him after he was stripped off?

A. Yes, sir; when they were dressing the wound.

Q. Did you see it?

A. I didn't notice closely. I saw the wound.

95 Q. You saw a wound in the back and one in the front?

A. Yes, sir.

Q. Could you tell from that where the ball went in?

A. If I had examined it.

Q. Did you examine it?
A. I did not examine closely.
Q. Then you could not say from the examination whether the ball went in the front or in the back, could you?
A. Not from where I was standing looking at the body.
Q. From the examination you made you can not now tell us?
A. I didn't make any examination.
Q. From the observation you made you can not tell us whether the ball went in the front or back, can you?
A. No; from the observation of the man laying on the bed I could not, but from observation of something else I could.
Q. I asked you from the observation that you made of the wounds on the man's body?
A. No, sir; I could not tell.
Q. Of course, you did not see the ball enter the man?
A. Of course not.
Q. When you saw them, was Welch going towards Smith when Smith fired at him?
A. He was going from him.
Q. When he first fired?
A. No, sir.
Q. When Smith first fired at him Welch was going towards Smith, was he not?
A. No, sir.
Q. What was he doing?
A. When I saw Welch he was standing still, and repeated the words I said awhile ago.
Q. They were about four feet apart?
A. Yes, sir.
Q. They were within reach, then, with their arms?
A. Yes, sir.
96 Q. You say Smith fired at him when they were that close together. How close were they when he fired the second shot?
A. I did not see any step made by either one of them.
Q. How did Welch have his body—fronting, facing like I am to you, or this way?
A. Welch had his face straight down the street, while Smith probably had one side a little towards him.
Q. Which shoulder was he shot in?
A. I don't know.
Q. The left shoulder, was it not?
A. I don't know.
Q. He was shot in his shoulder, at any rate?
A. Yes, sir.
Q. Where did it enter the shoulder?
A. I didn't examine closely to find out, but I remember of seeing two marsks on the shoulder.
Q. You saw a mark on the face somewhere, didn't you.
A. Yes, sir.
Q. Seemed to be made from the same shot?
A. I could tell what side of the shoulder it was in.

Q. What was it, then?

A. When he turned he turned his right side to me, and I could see his face when it was up that way, and i' was in the left shoulder.

Q. Then he must have had his left shoulder to Smith when he received that ball?

A. Yes, sir.

Q. You don't know whether Smith hit him the first shot or not?

A. No, sir; I do not.

Q. You don't know what shots struck him?

A. No, sir.

Q. The shots were fired rapidly, were they [snapping fingers rapidly]?

A. No, sir; not rapidly.

Q. They were fired deliberately—one shot and then silence, and then another one?

A. The first one was very quick, and then after that it was deliberate.

97 Q. The first one quick. I don't see how there could be any quickness about one shot. With regard to each other, as to the firing of the shots, were they in rapid succession?

A. No, sir; they were not in succession.

Q. What was Smith doing between the shots? When he shot the first shot what did he do until he fired the next one?

A. He was getting ready to fire the next one.

Q. Welch and he were about four feet apart, and neither one of them, you say, moved? Both of them were standing still, did I understand you to say?

A. Before the first shot?

Q. At the time of the first shot they were both standing still?

A. Right at the time——

Q. At the time of the first shot Welch was standing still, and so was Smith?

A. Yes, sir.

Q. At the time of the second shot what was Smith doing, and what was Welch doing?

A. He was walking off.

Q. How far had he gotten from him?

A. I could not tell you, sir.

Q. Well, about?

A. About ten feet, I suppose, probably.

Q. He had got six feet further away?

A. Yes, sir; probably six feet or further away from him.

Q. How far had he got at the third shot?

A. Probably about 20 feet.

Q. How close were you to them?

A. When they first commenced shooting I was about as far as from here across this room, I suppose.

Q. That is about five or six steps, is it not?

A. That is about ten steps.

98 Q. You were about ten steps?

A. Yes, sir.

Q. Anything between you and them to obstruct the view?

A. No, sir.
Q. You were in plain view of them?
A. Yes, sir.
Q. Did you remain there during the whole of this shooting?
A. The first two shots I set about as I am setting now and looked right at him, and the third shot he was getting a little out of line——
Q. I am talking about what you did. Did you remain standing there?
A. No; I got up just before he shot the third shot and walked to the door.
Q. You were sitting down?
A. Yes, sir.
Q. Where were you sitting down?
A. I was sitting down in a dance hall, I suppose it was.
Q. In a dance hall?
A. Yes, sir; close by the door.
Q. Was there anyone else around there?
A. There was two or three in there I noticed, another man or two on the other side laying down, and there had been one or two sitting by me, but I don't know who was there then. I think probably they had gone off.
Q. Were there any wagons out in the street?
A. Not that I could see at that time.
Q. Wagons or car'iages?
A. No, sir; I didn't see any at that time.
Q. You saw no vehicles at all?
A. Not at that time.
Q. At that time is what I am talking about.
A. Yes, sir.
Q. Do you know Welch's wife?
A. Yes, sir.
Q. Did you see her?
A. No, sir.
99 Q. Do you know her sister, Salina Dickson?
A. I do.
Q. Did you see her?
A. No, sir.
Q. Do you know Robert Marshal's wife?
A. I didn't know her then; no, sir.
Q. You know her now?
A. Yes, sir.
Q. Did you see her then?
A. No, sir.
Q. Do you know old man Newlin?
A. No, sir.
Q. Do you know him now?
A. No; I don't know him. I might know the man, but I don't know his name.
Q. Did you see him there—Mr. Newlin?
A. I don't know him by that name.
Q. You don't know him now?
A. I know his face, probably, but I don't know the man.

Q. Did you see that man who is a witness here by the name of Sam Newlin?

The ASSISTANT DISTRICT ATTORNEY. He says he does not know him.

Mr. C. J. FREDERICK (of counsel for defendant). Do you know Ella London?

A. Yes, sir.

Q. Did you see her there?

A. I didn't see her.

Q. Do you know John Jacobs?

A. Yes, sir.

Q. Did you see him there?

A. I did not.

Q. Did you know Prince Lowry?

A. No, sir; I know him now.

Q. Did you see him there?

A. I didn't see him.

Q. Will you be kind enough to tell us who you did see there?

A. I saw Charley Smith for one.

Q. You saw Charley Smith and John Welch?

A. Yes, sir.

Q. Who else did you see there?

A. I saw Robert Marshal that morning, and shook hands with him.

100 Q. At the time of this shooting I am talking about.

A. I don't remember a soul that I know of.

Q. Did you see any women there?

A. I saw plenty of women and men.

Q. At the time of the shooting?

A. Yes, sir.

Q. Where were the women?

A. Some were running one way and some another, like 'he men.

Q. The men were running, too?

A. Yes, sir.

Q. You were the only person that was sitting down and watching the shooting. The others were running?

A. Well, I soon got to running after that.

Q. The others had gone to running before you had?

A. Well, I seen the others run. I didn't look to see how many were sitting like myself or how many were running.

Q. You didn't?

A. No, sir.

Q. You don't remember to have seen anybody sitting like yourself?

A. No, sir; I don't remember that. I remember I saw them running. I remember that.

Q. Now, you sat there in as close as that wall there, and saw a man deliberately shoot at another. Did you say anything—tell him to stop? Did you call anyone to help stop it?

A. No, sir.

Q. You said nothing at all?

A. No, sir; I had no one to say anything to.

Q. Haven't you just told us there was lots 'f men and women there?

A. You asked me if there was anyone in there where I was, and I told you I didn't remember that there was anyone in there. When I went in at that place at first there was two or three in there, but I don't know whether they had gone or not.

101 Q. Were you looking out of the door?

A. Yes, sir.

Q. Whose tent was it?

A. Charley Smith's.

Q. You were in Charley Smith's tent?

A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. Dance hall?

The WITNES'. Yes, sir; they told me it was a dance hall. They told me it was Charley Smith's, and I suppose it was.

Mr. C. J. FREDERICK (of counsel for defendant). Which side of that tent street was that on, east or west?

A. It was on the east side.

Q. You were laying there?

A. I was sitting in there.

Q. How far back in the tent were you?

A. I was sitting about four or five feet from the door, I think.

Q. Let us be certain about this. You call it a dance hall. Was it a tent?

A. I think it was made of lumber.

Q. It wasn't a tent, then?

A. It was a shed, like.

Q. Boxed up?

A. Yes, sir.

Q. You were in that?

A. Yes, sir.

Q. How far back in that were you?

A. Four or five feet.

Q. Was there anyone else present making the same observations, or had the same opportunity that you had?

A. There was nobody in my place at all.

Q. No one in that dance hall that had the same opportunity to see that you had?

A. I don't know, sir. When I seen Mr. Smith run across I looked after him. I didn't look to see who was in there. They were in there when I went in, but who was in there at that time I don't know. I didn't look to see.

Q. You didn't call upon anyone to help?

A. No, sir; I did not.

102 The ASSISTANT DISTRICT ATTORNEY. What is your business up there?

The WITNESS. I am teaching out at the mission about six miles from there, and I preach.

Mr. C. J. FREDERICK (of counsel for defendant). You are a preacher?

A. Yes, sir.

Q. What were you doing in a dance hall?

A. To find a place to set down in the shade.

Q. There are other places besides dance halls to sit in?

A. I didn't find any then. There was no dancing then, and, as I learned, they didn't dance any in the daytime.

Q. It was a gambling place, too, was it not?

A. I don't know, sir. I didn't see any gambling at all.

Q. Who were you talking with? Were you talking with anyone there?

A. I wasn't. Mr. Smith was the last man I spoke to before the shooting.

Q. You did not hear anybody tell Smith to halt?

A. No, sir; did not.

Q. You didn't hear anybody tell him to stop?

A. No, sir.

Q. Make no exclamation towards him at all?

A. No, sir.

Q. And you saw the three shots fired by Smith?

A. Yes, sir.

Q. At Welch?

A. Yes, sir.

Q. Did you see Marshal at all?

A. Not at the time of the shooting. I had spoken to Marshal just before I went up there and took my seat down there in the shade.

Q. You had seen Marshal just before you went out there that morning; early in the morning. Was he on a horse?

A. Yes, sir; he rode up to me and spoke to me. Give me his hand.

103 Q. Was he sober?

A. He seemed to be sober.

Q. You were well acquainted with him, were you?

A. No, sir; not very well; slightly acquainted with him.

Q. You did not see Marshal do any shooting at all?

A. No, sir.

Q. And you heard nobody say "halt," or "stop?"

A. No, sir.

Q. You heard other shots besides these three, you say?

A. I heard shots besides those.

Q. How many?

A. I could not tell. There must have been some two or three or four, maybe. I don't know how many there was; I could not say positively.

Q. Several other shots you heard?

A. Yes, sir.

Q. You don't know who fired them?

A. No, sir.

Q. Fired in rapid succession, or were they deliberately like this [indicating]?

A. I could not hardly tell.

Q. How long were the first three shots fired by Smith until you heard the other shots?

A. It was just right after it, like. I know it wasn't long, because I wasn't long getting through the fence directly after the shooting.

Q. You got over the fence before you heard the other shots? You got outside before you heard the others?

A. I don't know whether I had got over the fence before I heard the first one or not, but I was getting out of the way.

Q. You were getting out of the way?

A. Yes, sir.

Q. Most everybody else had left before you did?

A. No, sir; I saw some ahead of me when I got out there.

Q. Did they all seem to run before you did?

A. I could not say that.

104 Q. All that you observed?

A. I could not say that, either.

Q. Tell us if somebody didn't leave before you did.

A. I can't say that, either.

The ASSISTANT DISTRICT ATTORNEY. Did you hear Smith say anything at the time he fired the shot at Welch?

A. No, sir; not just at the time. I didn't understand what he said, at any rate. He was saying something when he came out of the tent, but I could not understand what he said.

(Witness excused.)

Whereupon a recess was taken until 1.30 p. m.

105 AFTERNOON SESSION, 2.50 *o'clock*.

JOSEPH ARMSTRONG, having been duly sworn on behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. What is your name?

Answer. Joseph Armstrong.

Q. Where do you live?

A. Muskogee, Creek Nation, Indian Territory.

Q. Do you know the defendant, Charles Smith?

A. Yes, sir.

Q. Did you know John Welch?

A. Yes, sir.

Q. Did you know Robert Marshal?

A. Yes, sir.

Q. Were you at the grounds where the killing of John Welch and Robert Marshal took place?

A. Yes, sir.

Q. Where were you at the time of the first shooting?

A. Well, I was a little to the southeast; I suppose about 25 or 30 yards.

Q. Did you see Welch before the shooting commenced?

A. Yes, sir.

Q. Go on and tell us all you know about the shooting.

A. Well, I was a partner in a stand there, and I had went to town for something; I don't know what it was now. Anyhow, when I got back one of my partners said to her daughter, Mrs. Mayfield——

Mr. C. J. FREDERICK (of counsel for defendant). We don't want you to tell that.

The WITNESS. I was simply telling how I come to see them.

106 Mr. C. J. FREDERICK (of counsel for defendant). We just simply want you to tell what they said.

The ASSISTANT DISTRICT ATTORNEY. You need not state what they said to you. Go on and tell all about it.

A. I had been to town and I heard there was a fuss out there—some men fussing—and I went back around the back way of the tents, on the east there. There is a street running north and south, or kind of a road running north and south, and there is tents on each side of it, stands, and I went on the back way of the east line of tents and came out in about 25 or 30 yards from where they said the men were fussing; and I came out, and I didn't see anyone fussing at the time, or hear anyone; and I came out, and I saw Mr. Welch and Mr. Smith standing just about facing one another when I saw them first, and I saw Mr. Smith run into a little tent right south of where Mr. Welch's tent was, and when he came out he had a revolver in his hand, and he said something, I could not understand what it was; anyhow Mr. Welch made some reply, and at that time Mr. Smith shot.

Q. What was Welch doing when Smith shot?

A. He was standing with his hands down to his sides.

Q. Go ahead.

A. And when Mr. Smith fired the first shot Mr. Welch turned around.

Q. How close were they when the first shot was fired?

A. It looked to me that Mr. Smith could have touched him with the revolver if he had been so mind to do it.

Q. Could you tell which way the smoke went about him, whether to his feet or head or body?

A. It seemed that he shot him right here [indicating in breast].

Q. That is, the first shot seemed to hit him there?

107 A. Yes, sir; and Mr. Welch turned around then and walked off from him, and Mr. Smith fired again, followed him up and fired again. About that time Mr. Robert Marshal came up and holloed to Mr. Smith; said, "Charley, stop shooting that man," and he had his pistol out in his hand, and it seems the pistol went off up in this direction (above head). It didn't seem that it went off when he had it on Charley, but up that way.

Q Did he say "Charley stop shooting that man" before he drew his pistol or after?

A. He said it about the time; about the time he was drawing his pistol.

Q. He told Charley to stop shooting that man?

A. Yes, sir.

Q. What occurred then?

A. Charley whirled around and shot at him then.

Q. What took place then?

A. He seemed to have been hit from the way he acted. His horse was turning right north, his head standing north; after Charley shot the horse whirled around with him. It seemed to be hit, or else the blood splattered from the wound; and when he shot again I don't know what condition his pistol was, but it was a little bit too close for me to be safe, and I stepped back.

Q. Who shot again?

A. Mr. Robert Marshal.

Q. How many times did Mr. Robert Marshal shoot?

A. Twice.

Q. How many times did Charley Smith shoot at Robert Marshal?

A. I am not positive whether he shot more than once or not, but I was of the opinion that he shot twice.

Q. How many times did Smith shoot at Welch?

A. Three times.

108 Cross-examination by Mr. C. J. FREDERICK:

Q. You had a stand there yourself, didn't you?

A. Yes, sir; that is, I was a partner; I didn't own it all. I was just a third partner.

Q. You just had a third interest in the concern?

A. Yes, sir.

Q. What sort of a stand were you keeping?

A. Dance platform.

Q. You were running the dancing part of it?

A. Yes, sir.

Q. Played the fiddle?

A. Yes, sir.

Q. You had been down town, and they had the fusss while you were gone?

A. Yes, sir.

Q. You don't know what the fuss was?

A. Yes, sir; I do not.

Q. You say you came around from town, went around the back side way on the east of the tent?

A. On the east row of tents.

Q. You went on the back way, too, didn't you?

A. Yes, sir.

Q. What did you do that for?

A. I wanted to see who it was fussing.

Q. They made a pretty big fuss, didn't they; pretty loud fuss?

A. No; I didn't see no fussing at all, only just from what my partner said; I wanted to see who it was.

Q. What were you going in the back way for?

A. Because it was crowded in the front, and I could get around back quicker than I could the front way.

Q. You didn't hear any fussing then, did you?

A. No, sir.

Q. Where was your dance hall?

A. On the east side of the road running north and south, right the very first stand.

109 Q. Which way was it from Smith's tent?

A. Right north of Smith's tent.

Q. Which side of the row was it on, east or west side?

A. The east side.

Q. Over on the east side?

A. Yes, sir.

Q. The dance hall was right north of there?

A. Yes, sir.

Q. The next one to Smith's?

A. No, sir.

Q. What was the next one to Smith's?
A. A man by the name of Ketch Loren.
Q. Yours was still north of Ketch Loren?
A. Yes, sir.
Q. That was right close to the gate, was it?
A. Yes, sir.
Q. Was there another dance hall over there, too?
A. Yes, sir; Ketch Loren had a dance hall.
Q. You and your partners had a dance hall, and Ketch Loren had one. Is these all the ones?
A. There was four on that side of the street.
Q. Four of them on that side?
A. Yes, sir.
Q. Where were you when you saw this shooting?
A. I was between the fourth dance hall and the lemonade stand.
Q. You were at your own dance hall, were you not?
A. Not at the time of the shooting, I was not.
Q. How far were you from your dance hall?
A. I guess I was about 25 or 30 yards.
Q. 25 or 30 yards south of it, were you?
A. Yes, sir.
Q. How close were you to Smith and Welch when the shooting was going on?
A. I guess I was about that distance.
Q. About 25 or 30 yards?
A. Yes, sir; about that.
Q. You were about 25 or 30 yards from them when they done
110 the shooting?
A. Yes, sir.
Q. Which way were they from you?
A. They were to the northwest of me.
Q. You were down southeast, and they were 25 or 30 yards to the northwest?
A. Yes, sir.
Q. Anybody between you and them?
A. Not that I know of; I didn't see anyone.
Q. You could not see, could you?
A. I didn't see anyone at all.
Q. Was there anyone between you and that, now?
A. No, sir.
Q. You didn't see anybody between you and them?
A. No, sir.
Q. Open way?
A. Yes, sir.
Q. No wagons?
A. At the time I got around there there was.
Q. Was what?
A. Was open, but when I first came from town it was crowded out there.
Q. When you first came from town there was no shooting going on there?

A. No, sir.
Q. Was there any wagons in that little street between the tents?
A. There was when I first came from town.
Q. When you first came from town?
A. Yes, sir; just prior to the shooting.
Q. A good many wagons, was there?
A. There wasn't a good many; there was one or two standing there.
Q. Wagons?
A. Wagon or hack.
Q. Hacks is what they deliver in, is it not?
A. Yes, sir; one of them was.
Q. You were about 25 or 30 yards; did you hear what they said?
A. No, sir; I could not make out what they were saying.
111 Q. Everybody got away so you could see it well?
A. I don't know whether they got out of the way for me purposely or not.
Q. You say you saw Charley going in his tent?
A. Going in whose tent?
Q. I don't know.
A. No; I say he went into a tent and got a revolver, but I don't know whose tent it was.
Q. You were not acquainted much over there?
A. I was acquainted with a good many, but that was one place that I didn't know who was running it.
Q. Which side of the street was it?
A. On the west side.
Q. You saw him go in there?
A. Yes, sir.
Q. Where was Welch when he went into the tent?
A. Welch was standing in front of his own tent.
Q. How far off did he have to go, did Smith go, before he got to the tent?
A. I suppose five or six, or maybe seven steps.
Q. You don't know whose tent was close to Welch's?
A. No, sir; I didn't learn.
Q. You knew Welch's tent all right enough, but you didn't know the other right south of it?
A. No, sir.
Q. You were not acquainted with Charley Smith at that time, were you?
A. Yes, sir.
Q. You had known him, had you?
A. I had known him for a good while.
Q. You didn't know he had a tent there on that side, did you?
A. No, sir.
Q. You had been on your own side of the tent row mostly?
A. I knew he had a platform on the east, but I didn't know he had any on the west side.
112 Q. What was Welch doing while Smith went into the tent?
A. He was just standing there.
Q. Was he just standing up straight?

A. Yes, sir.
Q. Was he saying anything?
A. He wasn't saying a word.
Q. Which way was he looking?
A. He was looking towards the south.
Q. Looking towards where Smith had gone, wasn't he?
A. Yes, sir.
Q. How far was Welch from his tent?
A. I suppose about as far as that table.
Q. That would be four or five feet?
A. Yes, sir; I judge so.
Q. He staid there?
A. He staid right there.
Q. How far was that from the place where Smith went into the tent?
A. I told you it was about six or seven steps.
Q. He just kept looking the way Smith had gone, did he?
A. Yes, sir.
Q. How long was Smith gone when he came back?
A. I don't suppose it took him more than a minute.
Q. Did you see him go into the tent?
A. Yes, sir.
Q. Saw him come out?
A. Yes, sir.
Q. Anybody with him?
A. No, sir.
Q. Did you see anybody else in the tent where he went in?
A. I saw some one, but I could not tell who it was.
Q. Did you see anybody in John Welch's tent?
A. No, sir; not at that time.
Q. Charley Smith came out, and you saw the pistol?
A. Yes, sir; he had the revolver in his hand.
Q. What did Welch do when Smith came out with the pistol?
113 A. He just still stood there until Smith came.
Q. Did he have his face towards him?
A. Yes, sir; looking at him.
Q. Standing squarely?
A. Yes, sir.
Q. Wasn't he standing rather sideways?
A. No, sir; I don't think he was. He was standing facing him.
Q. Squarely facing him?
A. I don't suppose he had his feet like you have now.
Q. Didn't Welch have his face to the south?
A. Yes, sir; standing facing him.
Q. Wasn't Smith out there in the street?
A. Smith had to go south when he come into the tent and got the revolver.
Q. After he got in the tent didn't he go out there in the street?
A. Yes, sir; he went out a little ways, but didn't have to go far.
Q. How far did he go out there?
A. He didn't have to go far.
Q. Smith was standing right by his own tent?

A. I don't know whether that was his tent or not.
Q. That tent by the side of John Welch's?
A. He came out of that tent.
Q. He came out of that tent?
A. Yes, sir.
Q. He didn't have to go but five or six steps. How many steps did he go before he shot?
A. I don't know, but he didn't have to go but a little ways.
Q. I am not asking you what he had to do; I am asking you what he did do?
A. I could not say; five, or six, or may be seven.
Q. How close did he get to Welch?
114 A. I think he went up close enough to touch him with the revolver if he wanted to.
Q. Did he get that close?
A. Yes, sir; that is the best of my knowledge.
Q. When Smith got out in the street that way that put him between you and Welch, didn't it?
A. Not exactly, because I was to the southeast of them.
Q. He comes out of the tent here, goes out in the street a little piece here, and Welch is back here by his tent, and you are over southeast?
A. Yes, sir.
Q. Wouldn't that put Smith between you and Welch?
A. No; it would throw me to one side a little of them, a little bit.
Q. Did Smith walk up fast to him, or did he walk slow?
A. He walked tolerable fast.
Q. Did he say something?
A. He said something, but I didn't understand what he said.
Q. Did Welch say something?
A. He said something back to him, but I didn't understand what he was saying.
Q. You say Welch had his hands down?
A. Yes, sir.
Q. Both of them?
A. Yes, sir.
Q. Both swinging down?
A. Both in this position [indicating].
Q. Did he have anything in his hand?
A. He had a little weed in his hand.
Q. How long?
A. I suppose about that long [indicating about a foot or 18 inches].
Q. How do you know it was a weed?
A. I saw it.
Q. You can tell a weed 25 yards away in a man's hand?
A. I suppose I could.
Q. Did it have any leaves on it?
A. No, sir.
115 Q. Was there much noise around there then.
A. There was a great deal of noise.
Q. What sort of noise?

A. Noise made by them steam swings, and then a good deal of loud talking and laughing.

Q. Laughing and talking?

A. Yes, sir.

Q. And you say he went up so close to him you thought he could have touched him with the revolver?

A. Yes, sir.

Q. That is the time he fired, is it?

A. Yes, sir.

Q. Welch was standing right facing of him?

A. Yes, sir; when he came up to him.

Q. Welch saw the pistol, I reckon, did he?

A. I guess he did.

Q. Didn't offer to run off?

A. No, sir; he never did run.

Q. Didn't turn around?

A. He did after the first shot.

Q. I know, but before the shot. Didn't turn around?

A. No, sir.

Q. Stood there facing him?

A. Yes, sir; until after the first shot was fired, and then he turned around.

Q. Let's not get ahead of ourselves. Didn't step backwards, did he?

A. No, sir.

Q. He didn't throw up his hands?

A. No, sir.

Q. Still kept his hands hanging down?

A. Yes, sir; still hanging to his side.

Q. Where was Smith's pistol pointed?

A. Well, when he came up he didn't have it pointed at all.

Q. How did he carry it?

A. In his hands, swinging down this way [showing].

Q. How close did he get to him before he raised it up?

116 A. I thought he got up close enough to touch him.

Q. That is the time he raised the pistol up?

A. Yes, sir.

Q. Then he raised it up, did he?

A. No, sir; he said something to John, and then John made some reply back.

Q. When Charley came up to him, when he got up in reach of him, he raised the pistol and fired, did he?

A. Not before he said something to John.

Q. You have already told us two or three times you don't know what he said.

A. I am telling you that he didn't do it until after he said something to John.

Q. You don't know what that was?

A. No, sir.

Q. I am talking about what he did, not what he said. When he got up in reach of him, as you think, he raised the pistol and fired; he didn't hold the pistol on him and then shoot?

A. No, sir.
Q. He shot as soon as he raised it up?
A. He must have done so.
Q. Then they were standing breast to breast?
A. Yes, sir.
Q. He fired again right straight before taking the pistol down again, didn't he? He didn't lay the pistol down, and then raise it up and shoot again, did he?
A. I don't know about that.
Q. You were looking?
A. I didn't pay so much attention to that.
Q. Did he shoot again?
A. Yes, sir; he shot again.
Q. Right straight afterwards?
A. He shot right after he whirled around.
Q. After who whirled around?
A. After Welch whirled around.
117 Q. I am not talking about what Welch did now. Smith goes out there, and pulls his pistol down and fired on him. Now, then, Smith fired again, did he?
A. Yes, sir.
Q. Right straight?
A. No, sir; not right away. There seemed to be two or three seconds——
Q. Did he let the pistol down?
A. I didn't notice that part of it.
Q. Or did he still hold it up?
A. I could not say whether he did or not, but it was two or three seconds between the first and second shots.
Q. Two or three seconds?
A. Yes, sir; as well as I could get at it.
Q. How many seconds was there between the second and third shot?
A. I don't suppose there was——
Q. Any?
A. No, sir.
Q. Fired about like that [indicating a space between the first and second shots, and the two last closer together]?
A. Yes, sir.
Q. Smith didn't follow him then, did he?
A. He was following him up all the time he was shooting.
Q. He could not follow a man that was not moving.
A. He did do it.
Q. Welch stood still?
A. He stood still the first time.
Q. Until after he fired the first shot Welch did not move at all?
A. Yes, sir; and then he whirled around after the first shot was fired, and walked off from him.
Q. He walked off fast, didn't he?
A. No, sir; not fast.
Q. Gradually?
A. Ordinary walk, I should think.

118 Q. How did Smith go—fast?
A. No, sir; not fast.
Q. Did he walk at all?
A. He followed him up.
Q. How far?
A. I don't know just how far he followed him.
Q. How many steps?
A. I could not tell you that.
Q. About how far?
A. I suppose he kept about five or six feet behind him.
Q. You suppose so?
A. Yes, sir.
Q. Kept about that many feet behind him, and during this [snapping fingers representing the manner shots were fired]?
A. Yes, sir.
Q. He didn't have time to go very far in that time?
A. No, sir.
Q. You think about five or six steps?
A. Five or six feet, I say.
Q. Did you see Welch fall?
A. No, sir; I didn't see him fall.
Q. Did he fall at all?
A. I didn't see him fall.
Q. Where did he go to?
A. He went towards Ketch Loren's platform, next to mine.
Q. Now, during all this time you didn't move away from where you were?
A. I didn't move at all until——
Q. You were down at what place at the time you saw the shooting?
A. Between the fourth platform, owned by Randolph Perryman, and the lemonade stand.
Q. Randolph Perryman's lemonade stand is where you were at?
A. No, sir; I said between his platform and the lemonade stand.
Q. Whose lemonade stand was that?
A. It was some white man's, but I don't know his name.
119 Q. Charley Shepard's?
A. I don't know his name; he is a stranger to me.
Q. After Charley had followed Welch five or six steps and fired the last shot, Welch then went off into Ketch Loren's place, you say?
A. He staggered off over that way.
Q. Walked or staggered?
A. Yes, sir; walked over that way.
Q. How long was it until Marshal came up?
A. Marshal came up about the time that he was making the third shot.
Q. About that time?
A. Yes, sir.
Q. While that shooting was going on Marshal came up, did he?
A. About the third time Charley shot.
Q. Did he come up before or after the third shot?
A. He came up about the time.
Q. Did he come up while the shot was being fired?

A. I suppose so.

Q. How far was Marshal from Smith when he came up and spoke to him?

A. Marshal was a little bit south of me when he first spoke to him.

Q. Then he was over 35 yards from him when he first spoke to him?

A. Yes, sir.

Q. You were 25 yards away?

A. I said 25 or 30.

Q. Marshal was still further away than you?

A. Yes, sir; still south of me, but very little.

Q. How far south of you?

A. I suppose he was on a line about ten yards south of me.

Q. Then he was about 35 or 40 yards from Smith when he first holloed to him?

A. Yes, sir.

Q. On his horse?

A. Yes, sir.

120 Q. Pistol in his hand?

A. He took out his pistol when he holloed; he was drawing his pistol when he holloed.

Q. That was about 35 or 40 yards away?

A. Yes, sir.

Q. He took out his pistol and fired, did he?

A. Yes, sir.

Q. How far was he from Smith when he fired?

A. He didn't diminish the distance any.

Q. Then he was 35 or 40 yards from Smith when he fired, was he?

A. Yes, sir; he holloed "Charley, stop!" and shot about the same time.

Q. What did he say?

A. Charley, stop shooting that man.

Q. There were a good many people up there around where Charley was, wasn't there?

A. No, sir; I don't think there was.

Q. The ball passed pretty close to you, didn't it?

A. No, sir.

Q. Didn't you hear it whistle?

A. No, sir.

Q. You say Charley fired one shot at Marshal?

A. Yes, sir.

Q. How close was Marshal to him when Charley fired on him?

A. He hadn't diminished the distance at all from me, it didn't seem.

Q. Then it was some 35 or 40 yards?

A. Yes, sir.

Q. Marshal shot twice, you say?

A. Yes, sir.

Q. How long after Marshal was shot until Marshal fell?

A. He didn't fall until after he was shot the second time.

Q. Marshal didn't fall until after he had fired his pistol the second time? What direction was Marshal's first shot? You say it was towards Charley?

A. No, sir; I said it was up in this position; not right down on Charley.

121 Q. Was he shooting at the stars, that way, away up in the heavens?

A. I don't know what he was shooting at. It didn't seem to me like he was shooting at Charley.

Q. You were about 10 steps from Marshal?

A. I don't know how far I was. I think it was over ten steps. I said he was about ten steps south of me on a line—on the same line running north and south would throw him about ten yards south of me.

Q. How far was he from you?

A. He was the distance of 30 feet, because here is a drive way——

Q. Say this [indicating] is where Welch and Smith were. Marshal was how far south of you, you being down here [indicating]?

A. About ten yards, I guess, on a line, on the west side of me. I was standing on the east side.

Q. How far would Marshal be from you then?

A. That would put him about 30 feet from me.

Q. What is the difference between 30 feet and 10 yards?

A. I do not know.

Q. It was something about that?

A. Yes, sir.

Q. And then he shot twice at Smith before he fell off his horse?

A. I don't know whether he shot twice at him or not.

Q. Who did he shoot at the second time? He shot one shot up in the stars. Where did he shoot the next time?

A. I don't know where the other shot went.

Q. How was the pistol when he was shooting the next time?

A. When his horse whirled the pistol went off without its being shot. After the horse whirled he fell to one side and the pistol went off. I don't know whether he fired it at any one or not.

Q. You think the pistol was pointed up?

A. Yes, sir; the first time it looked like the pistol went off in that direction [indicating].

122 Q. You were acquainted with Marshal, were you not?

A. Yes, sir.

Q. How long had you known him?

A. I have known him nearly ten years, I suppose longer than ten years.

Q. Had you seen him before that day?

A. Oh, yes, sir.

Q. You had seen him that night before?

A. I don't know whether I saw him that night before or not.

Q. Didn't you see him the night before?

A. I don't think I did.

Q. Wasn't he and John Welch together the night before?

A. I don't know. At night I staid right on my platform playing. I wasn't apt to see anyone unless they came over to the platform.

Q. Do you know whether Marshal was sober or not?

A. I do not.

Q. Was he sober the night before?

A. I don't know; I told you I didn't see him.

Q. How far is it between these tents—there is a row on the east side and one on the west side—how far is it between the tents?

A. I should judge it is about 30 feet; there is room for two wagons to pass, one going one way and one the other.

Q. About 30 feet?

A. Yes, sir.

Q. It would not take 30 feet for wagons to pass.

A. That is the rule. I said I would judge it was about 30 feet. I don't know whether it was or not. I never measured it.

Q. How large is the whole enclosure there?

A. Oh, it is a big lot. It is a pretty large lot altogether.

Q. About how large?

A. Oh, I could not tell you.

123 Q. Do you know where a man kept a fish stand there?

A. No, sir; I never paid any attendion to these other stands much.

Q. You were busy at your dance?

A. Yes, sir.

Q. How many women did you see around there close to where Smith and Welch were at the time the shooting was going on?

A. Oh, I don't remember of seeing any.

Q. How many men were around there?

A. Well, I don't recollect of seeing more than one or two of them.

Q. One or two?

A. And they were run'ing.

Q. That is what I thought. They were not running before the shooting began, were they?

A. No; they were running while the shooting was going on.

Q. Who were they?

A. I don't know who they were.

Q. Did you see this man Triggs there?

A. No, sir; I didn't notice him.

Q. You didn't see him?

A. I did not.

Q. Did you see Louiza Welch there?

A. I saw her after the shooting.

Q. At the time of the shooting?

A. No, sir; I did not.

Q. You didn't see her?

A. No, sir.

Q. Did you see Sam Newlin?

A. No, sir.

Q. Do you know Sam?

A. I know him when I see him.

Q. Did you see Rose Marshal there?

A. I saw her after her husband was killed, and after he fell off his horse.

Q. You didn't see her until after that?

A. No, sir.

Q. Did you see Ella London there?

A. No, sir; I did not.

A. No, sir; I said it was up in this position; not right down on Charley.

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A. I don't know what he was shooting at. It didn't seem to me like he was shooting at Charley.

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A. Yes, sir.

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A. I don't think I did.

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A. I do not.

Q. Was he sober the night before?

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Q. About 30 feet?

A. Yes, sir.

Q. It would not take 30 feet for wagons to pass.

A. That is the rule. I said I would judge it was about 30 feet. I don't know whether it was or not. I never measured it.

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A. No, sir; I never paid any attendion to these other stands much.

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Q. How many men were around there?

A. Well, I don't recollect of seeing more than one or two of them.

Q. One or two?

A. And they were run'ing.

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A. No, sir; I didn't notice him.

Q. You didn't see him?

A. I did not.

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A. I saw her after the shooting.

Q. At the time of the shooting?

A. No, sir; I did not.

Q. You didn't see her?

A. No, sir.

Q. Did you see Sam Newlin?

A. No, sir.

Q. Do you know Sam?

A. I know him when I see him.

Q. Did you see Rose Marshal there?

A. I saw her after her husband was killed, and after he fell off his horse.

Q. You didn't see her until after that?

A. No, sir.

Q. Did you see Ella London there?

A. No, sir; I did not.

Q. Did you hear Marshal hollo to Smith "Halt! halt!" several times?
A. Heard him say "Stop shooting that man."
124 Q. I know that; you have told us that, but did you hear him say "Halt, halt, halt?"
A. No, sir; I don't believe I did.
Q. You didn't hear him say that?
A. No, sir; he may——
Q. He never used the word "halt," you don't think?
A. I don't think he used such word as "halt."
Q. Did you see Dollie London and Myrtle King there?
A. I don't know Dollie London.
Q. Don't you know them?
A. I know one Dollie London, but I don't think she was on the ground at all.
Q. You saw no women at the time of the shooting at all?
A. No, sir; I never noticed any women.
Q. Did you see John Jacobs?
A. No, sir; if I did I would not have known him, because I only have been slightly acquainted with him.
Q. Did you see Prince Lowry?
A. I did not.
Q. Could you see a man at Charley's tent? Was there anybody standing in front of where Smith got the pistol?
A. I didn't see any one.
Q. If John Jacobs had been standing there you could have seen him, could you not?
A. Yes, sir; I guess I could if I had been——
Q. If he had been standing there you could have seen him, could you not?
A. Yes, sir.
Q. You didn't see him?
A. I did not see him.
Q. When you come to boil it all down, you only saw one or two men, and they were running?
A. Yes, sir; that is all.
Q. And they were running?
A. Yes, sir.
125 Q. Which way were they running?
A. They were running north.
Q. They were beyond the place where the shooting was at?
A. Yes, sir.
Q. And nobody between you and where they were?
A. No, sir.
Q. Do you know about a mound in that tent street there back of where Marshal came up? Don't you know where there is a little mound in that street between the tents, down towards the south?
A. Yes, sir; there is a little raise of ground there.
Q. There was a tent on that, wasn't there?
A. I think there was.
Q. Right in the middle of the street, was it not?
A. I don't know about the position of it.

Q. Well, about the middle of the street, was it not? A tent on that? Down south?

A. No; there wasn't any tent on that middle street.

Q. Was there a tent on that mound?

A. Yes, sir.

Q. That was at the back end, wasn't it, back of the lot?

A. Yes, sir; right on a line. All of them stood on a line.

Q. Wasn't there a mound right in the middle of the street at the back end?

A. I think so.

Q. Wasn't there a tent on that mound?

A. Yes, sir; I said there was a tent on the mound.

Q. And the mound was about the middle of the street?

A. Yes, sir.

Q. Where was that merry-go-around?

A. That was right back of that little mound.

Q. What direction was it from that?

A. It was west, I should say. A little west of the mound, as near as I can get at it.

126 Q. How far was Marshal from this mound you speak of at the time you saw him and heard him hollo to "stop shooting that man?"

A. He had come a little this side of the mound.

Q. That is a little, north of it?

A. Yes, sir.

Q. Which way did he come from?

A. He came from the south.

Q. He came from around towards that merry-go-round?

A. He came from around that direction somewhere; I could not tell exactly where he came from, but when I saw him he was coming on his horse.

Q. Coming on his horse?

A. Yes, sir.

Q. Holloing?

A. He holloed to him to stop that shooting.

Q. Did you hear Charley Smith say anything after he came out of the tent?

A. I heard him say something, but I could not understand what it was.

Q. Not very loud, then?

A. No, sir.

Q. Did you hear any whooping there by anybody?

A. I heard whooping after the shooting commenced.

Q. Just before the shooting and at the time of the shooting?

A. I heard a lot of screaming and holloing going on at that time.

Q. Did you hear Smith whoop just about the time that he and Marshal got to shooting?

A. No, sir; I never heard him.

Q. Did you hear him?

A. No, sir.

Q. You could have heard him if he had, could you not?

A. Yes, sir.

Q. You didn't hear him?
A. No, sir.
Q. These tents, on the east side, up next to the fair ground, do they go up to the fair ground fense?
A. No, sir.
127 Q. What is at the back of these tents, between that and the fair ground fense?
A. There is a big ditch.
Q. How far were the tents located from the fair ground fence, on the east side?
A. Oh, I suppose ten feet, maybe.
Q. The ditch is back behind, and there is some space between the ditch and the fence?
A. Yes, sir.
Q. How close were you to the ditch at the time you saw this shooting?
A. I was to the front of the tents, on the east side. I was to the front. You know the tents on the east side front west.
Q. How many tents were there on the east side? You know where Hannah Mayfield8's tent was?
A. That is the one I am talking about. That is the one I am a partner in.
Q. That is the first one as you go in on the east side?
A. Yes, sir.
Q. Who was the next one?
A. Ketch Loren was the next one.
Q. There was a cider stand between you and Ketch Loren, was there not?
A. I don't know what you call it; some call them Italians; they had a kind of a little store there; I don't know what it was.
Q. Something to drink?
A. Yes, sir.
Q. And then the next was Ketch Loren's?
A. Yes, sir.
Q. And the next one, who was that?
A. I forget whether it was Mr. Smith——
Q. Carver?
A. I forget now whether his one came next, or whether the platform came next.
Q. And then came the Charley Smith hall, didn't it?
A. I know there was three platforms right close together.
Q. Was there a tent between the platform of Ketch Loren and Charley's?
128 A. I don't know whether there was or not; I am not certain about that.
Q. There was one—what was the next one south of Charley Smith's hall?
A. I don't know, but I think there is a boarding tent where they get meals, and then a gambling platform.
Q. Whose platform?
A. That was Randolph Perryman's, was the last platform.
Q. And that was the one you were close to?
A. Yes, sir.

Q. There was no other tents or anything south of Perryman's?
A. There was a lot of tents there.
Q. What were they?
A. I think they had little notions to sell. And then I think there was one where they kept it for a sleeping tent. I am not certain.
Q. Who kept that?
A. I think it was Miss Nevins.
Q. Some ladies kept a sleeping tent there?
A. Yes, sir; Miss Ollie Nevins; I think it was a sleeping tent. I never was in there, but I think that was what she was keeping.
Q. How close is that sleeping tent to the tent on the little mound down there?
A. I think there was a tent on—that mound is right in the center, and there is a tent on each side of the mound.
Q. The whole thing was filled up with tents all around there, wasn't it?
A. Oh, there is lots of tents there.
Q. When you saw Marshal riding up on his horse and holloing to Charley to stop shooting that man, he was going fast on his horse, was he not?
A. He wasn't going very fast.
Q. He wasn't just jogging along in a trot or walk, was he?
A. His horse was kind of cantering.
129 Q. His horse came a cantering up, and he had a pistol in his hand, and he holloed at Charley——
A. When I saw him he didn't have his pistol in his hands at that time.
Q. But while you were looking at him he took his pistol out?
A. Yes, sir.
Q. And he was then 25 or 30 yards away from him?
A. Yes, sir.
Q. And his horse going in a canter?
A. I would not say that he was——
Q. You said canter?
A. Well, I meant when I said canter, he was just kind of fox trotting.
Q. You swap it off for fox trot?
A. Yes, sir; he wasn't loping, or anything like that.
Q. Wasn't loping or cantering, but just kind of a fox trot?
A. Yes, sir.
Q. He was fox trotting up towards Charley?
A. Yes, sir.
Q. He was in a pretty good fox trot? He holloed to him with his pistol in his hand, and then after he said that he shot?
A. No; he didn't have his pistol in his hand at the time when I saw him first.
Q. But directly after you did see him you saw him take his pistol out?
A. He took his pistol out and at the same time holloing at Charley not to shoot that man.
Q. And let the pistol go?
A. He had the pistol about in that direction [indicating].
Q. About 30 degrees?
A. I don't know how many degrees.
Q. Would it have hit the tent?

A. If it had been pointed in that direction it might.
130 Q. Wasn't it held above the top of the tents?
A. It might, I say, if it was held in that direction.
Q. Then it was low enough to hit the top of the tent if it had been pointed in that direction?
A. Yes, sir; just about that direction [indicating].
Q. Would that have gone over the tents if it had fired?
A. I don't hardly think it would.
Q. What is the lay of the land there; is it up and down, or sidling?
A. It is level, all with the exception of that mound there.
Q. You say your tent is the one next to the gate?
A. Yes, sir.
Q. Did you go back of the tent and then go out there by——
A. Yes, sir; there is a door; I went into my door and then went right on back through.
Q. You had to cross the ditch?
A. No, sir; went down t'rough the ditch.
Q. You went down the ditch back of all the tents?
A. Yes, sir; and came out at that platform.
Q. Came out 25 or 30 yards below there?
A. Yes, sir.
Q. Came in that way?
A. Yes, sir.
Q. What did you do that for?
A. I wanted to see what was going on.
Q. There wasn't anything going on down that way, was there?
A. That was the quickest way for me to get through that way at that time.
Q. Wasn't it just simply because the other street was crowded; wasn't that the reason you went back?
131 A. Yes, sir; the street at that time in front was kind of blocked.
Q. Then there was no wagons or vehicles in the street at that time, but people?
A. There was people, and wagons, too.
Q. What wagons?
A. I don't know.
Q. How many?
A. One or two.
Q. Which is it, one or two?
A. I think there was two.
Q. You think there was two wagons?
A. Yes, sir; delivery wagons, and then there was a draw wagon there, I think.
Q. They were up near the gate, were they?
A. Yes, sir.
Q. How long was that before the shooting when you saw these wagons out there near the gate?
A. I don't know; it wasn't over two or three minutes, I don't suppose. It didn't take me very long to go around there where I was.
Q. You had to sort of stoop under the tent strings to get down in that ditch, didn't you?

A. No, sir.
Q. Wasn't there some tent strings on this side of the ditch?
A. I didn't see any.
Q. It is a pretty good, big, wide ditch, isn't it; as wide as these tables, wasn't it?
A. I don't think it is that wide.
Q. Just a little bit of a narrow trick, then; about waist deep?
A. No, sir; not over 18 inches deep, I don't think.
Q. Did you ever walk in that ditch before?
A. Oh, I have been in that ditch several times.
Q. Did you ever walk that ditch from up next to the gate at your tent down back close to the ladies' sleeping apartment?
A. No, sir; I was never down that way that far.
Q. That is the only time you were ever down that far?
132 A. Yes, sir.
Q. Is that the only time you had ever walked in that ditch?
A. No, sir; I had been down in there several times.
Q. When was it you told anybody about seeing this difficulty? Who was it you told about it?
A. Oh, I have spoken to several, I guess, about it.
Q. When were you summoned down here?
A. I was summoned here the 12th; I got the subpœna the 11th—no, Saturaday last; I forget now what time it was.
Q. Who did you talk with about it? Did you talk with Jim Richardson about it or Bill James? Did you talk with Bill James about it?
A. I think I did.
Q. You told him about going down there back that way in the ditch, did you?
A. No, sir; I didn't tell him anything about going down that way.
Q. You have all been talking about it since you came here, haven't you?
A. I suppose we have.
Q. When did you first think about the idea of going down that ditch and getting back there so you could see it?
A. Well I generally used that ditch as kind of a private way.
Q. That ditch is used for a sewer, and you tell the jury you walked down the ditch that is used for a sewer to get back this way to see what was going on. You come down a ditch that is used for a sewer for private purposes; is that right?
A. That is right; I don't know whether everybody else uses it or not.
Q. You use it for a private walk way as well as for a private sewer?
A. Yes, sir.
133 Q. Where did you come from?
A. The State of Kansas.
Q. Where do you live now?
A. I live at Muskogee.
Q. Have you ever been arrested for anything?
A. No, sir.
Q. Never have been arrested in your life?
A. No, sir.
Q. What do you follow for a livelihood?
A. Different kinds of work.
Q. What sort of work do you do?

A. I work on a farm sometimes.
Q. What else?
A. Work around hotels some.
Q. What else?
A. Play the fiddle.
Q. What farm did you ever work on? In the Territority?
A. Yes, sir; I have worked in the Territory.
Q. What farm did you ever work on?
A. The first farm I worked on was a man named Brown—Bill Brown; he is the first man I worked for.
Q. When was it you came to the Territory? Last year?
A. No, sir; I have been in the Territory it will be 12 years the 20th of this coming May.
Q. Bill Brown is a barber, is he?
A. Yes, sir.
Q. Do you know where his farm is located?
A. I know where his farm was when I first come; I know now where it was situated.
Q. What did you go on that farm for? To play the fiddle? Did you play the fiddle on the farm?
A. No, sir; I plowed.
Q. Where was Bill's farm?
A. At the time I came here it was down southeast part of town. It is now enclosed in Sever's pasture; Severs has got a pasture there and got it all enclosed.
Q. Pretty big farm, was it?
A. No; it wasn't a very large farm; it was about 12 or 14 acres, I should judge.

The ASSISTANT DISTRICT ATTORNEY. You were summoned at
134 the same time all the other witnesses was, were you?

A. No, sir; I didn't get my summons until Saturaday?

Mr. C. J. FREDERICK (of counsel for defendant). Don't you know that place has never been cultivated, and has not been for the last 12 or 15 years?
A. I said when I first come there; I didn't say now, but when I first come.
Q. Twelve years ago?
A. It will be 12 years ago the 20th of this coming May.
Q. It was cultivated then, was it?
A. Yes, sir; it was; about 12 or 14 acres of it.
Q. What was it cultivated in?
A. Corn and oats.
(Witness excused.)

135 JIM RICHARDSON, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?
Answer. Muskogee.
Q. Did you know John Welch in his lifetime?
A. Yes, sir.

Q. Did you know Robert Marshal?
A. Yes, sir.
Q. Do you know Charley Smith, the defendant in this case?
A. Yes, sir.
Q. Were you out there at the ground on the day of the shooting of Welch and Marshal?
A. Yes, sir.
Q. Did you see the shooting of Welch?
A. Yes, sir; I saw the two shots.
Q. Just tell what you saw of the whole thing. Go on in your own way.
A. When I was coming out to the fair grounds in a carriage, stopping and talking to Robert Marshal, and Charley and Mr. Welch were down in front of their places down there, and they directed my attention by the great wailing from Charley, and by that time I heard shooting, and I says to Mr. Marshal, "Look at Charley shooting John Welch."
Mr. C. J. FREDERICK (of counsel for defendant). Don't state that.
The ASSISTANT DISTRICT ATTORNEY. Who was it—Robert Marshal, the man who was killed?
A. Yes, sir; I was standing right by his horse at the time, and he had his face to me, and I was standing down to the ground, and he was
136 on his horse, and I says to him, "Look at Charley shooting John Welch." He hollored at Charley at that time, and told him to throw up his hands, and pulled his gun and shot at Charley, and Charley made the next shot at John, and I saw the third shot, and Charley turned around and shot at Robert Marshal, and shot him, and he whirled off his horse, and turned right around and came down on the ground, and I tried to pick him up, and I got on Robert Marshal's horse for somebody to go after the doctor, and I goes to the gate and I gets shot down.
Q. Who shot you?
A. Simps Bennett.
Q. How did you happen to get shot?
A. I was going for the doctor.
Q. Was he shooting at you because it was you, or somebody else?
Mr. C. J. FREDERICK (of counsel for defendant). Don't state it, if it is what somebody else told you.
The WITNESS. Simps Bennett told me——
Mr. C. J. FREDERICK (of counsel for defendant). We don't want you to state what Simps Bennett told you.
The WITNESS. Well, I got shot down at the gate.
The ASSISTANT DISTRICT ATTORNEY. You were not taking any part in the fight, were you?
A. No, sir.
Q. What was Welch doing at the time Charley shot him first?
A. I don't know what he was doing.
Q. You didn't see that?
A. No, sir.

Cross-examination by Mr. C. J. FREDERICK:

Q. Where were you when you called Marshal's attention to the
137 fact that Smith was shooting at Welch?

A. I was standing on the ground, and Robert Marshal was on his horse.

Q. Marshal was sitting on his horse and you were standing on the ground?

A. Yes, sir.

Q. Up there in that little lot?

A. No; we were out near the merry-go-around.

Q. Was that merry-go-around in that tent street?

A. No; it was off right opposite of Charley's place, to the left of where we were standing at.

Q. It was west of it, was it?

A. That merry-go-around was west of my left.

Q. How far was the merry-go-around from the gate?

A. I don't know; some distance.

Q. It was down towards the back end of the lot, wasn't it?

A. It was south from the gate.

Q. South from the gate?

A. Yes, sir.

Q. About how far from the gate was that?

A. I don't know; right smart distance.

Q. One hundred yards?

A. I said more than 100 yards.

Q. About how far was that merry-go-around from Charley Smith's tent?

A. I can't tell.

Q. Well, about how far?

A. Well, I don't know; about 30 feet, I suppose.

Q. Just think a minute, and see if you are right about that—from the merry-go-around to Charley Smith's tent?

A. The land was large enough for two wagons to pass in there, and the merry-go-around was just to the left.

Q. The merry-go-around was south of Adam's place, was it not?

138 A. I don't know whose Adam's place was.

Q. It was south of that shooting target, was it not?

A. I don't know where the target ground was.

Q. How far was that merry-go-around from the tent on the mound; there is a little mound in the back end of the ground, is there not?

A. I don't know anything about that mound down there.

Q. You think about 30 feet would be a good guess?

A. I will tell you how it was: over here was Charley's place, and right across was the merry-go-around, and myself and Marshal was standing between the merry-go-around, right opposite the merry-go-around, and Charley's place was to the right of *is*.

Q. How far were you and Bob Marshal from Charley Smith's tent at the time of the shooting?

A. Not a tent. This was a little house; kind of a board house throwed up.

Q. Well, board house, whatever you call it. Charley's place.

A. How far was Marshal and I from the tent?

Q. Yes.

A. Well, we were on the near side, next to the merry-go-around.

Q. About how far was it; as far as from you to me?

A. Perhaps that far; I can't tell. (About 20 feet.)

Q. You and Marshal were standing as close as you are to me to Charley Smith and John Welch when Charley was shooting him?

A. I don't understand you.

Q. I want you to tell me how far, if you can, you and Marshal were from Charley Smith at the time of the shooting?

A. How far I was from Marshal?

Q. No.

A. How far I was from Charley Smith?

Q. Yes.

A. I was standing up next to Marshal, and Charley was down in front of Welch's tent.

139 Q. About what distance is that?

A. I don't know; perhaps further than from here to door there, and maybe a little further [indicating about 60 feet].

Q. Do you think it was that close?

A. Yes, sir; as far as from here to where that gentleman is standing in the door.

Q. Wouldn't it be a better estimate to say it was as far as from here to the county jail (about 150 yards)?

A. I don't know; it wasn't that far.

Q. You didn't have any business there yourself, did you?

A. I rode out there in a carriage, going to the fair ground.

Q. What were you going out there for? Were you running a business there, too?

A. No, sir; I was going to the races.

Q. Whose carriage were you in?

A. Mr. Heffner's.

Q. Instead of going to the races you stopped there next to the merry-go-around, and came through there?

A. Yes, sir.

Q. Is that the way to go?

A. No, sir.

Q. You drove around out of the way?

A. I went in there to see the excitement. Part of the colored people were on the outside haveing a good time, and we thought we would drive through there.

Q. Did you have any ladies with you?

A. No, sir; there was an Indian in there with me, and a white man.

Q. What first attracted your attention to Charley Smith and John Welch?

A. I got out of the carriage, and was standing talking to Mr. Marshal, and his horse was south and my face was fronting north; I was standing talking to Marshal about some transaction. I think I asked him had he saw his wife, or something like that. I saw the crowd disperse or scatter, and I heard the shooting, and I remarked to Marshal, "Look at Charley shooting John Welch."

140 Q. How did you know who it was?

A. I saw John Welch, and I knew him as good as anybody. I was personally acquainted with both of them.

Q. Who was shooting?
A. Charley was shooting John Welch.
Q. You saw Charley shoot?
A. Yes, sir; I saw Charley shoot John Welch.
Q. You saw them both plain enough from where you were?
A. Yes, sir.
Q. Could Marshal see them from where he was?
A. He had his face turned south. I remarked to him at the time, "Look at Charley shooting John Welch."
Q. Marshal's face was turned south?
A. Yes, sir.
Q. How many shots did you hear up there?
A. I heard three shots.
Q. Pretty fast shots?
A. No, sir.
Q. Right slow, were they?
A. No, sir; medium shots.
Q. They were about this way were they not [indicating that shots were fired rapidly]?
A. No, sir; they didn't go quite that fast.
Q. About this way?
A. I can tell you how it was done.
Q. Tell it.
A. After Charley shot the first shot, when he shot John Welch, he cocked his pistol and made one or two steps towards him and shot him.
Q. You didn't see the first one, did you?
A. No, sir; I heard that.
Q. You heard that, and then you looked, and then saw him make two or three steps, and then fix his pistol, and then shoot, and then make two or three steps this way, and then shoot again?
141 A. Yes, sir; that is right.
Q. How close were they together when the first shot was fired?
A. I could not tell you how close they were together when the first shot was fired.
Q. If they had been in reach of one another he could not have made so many steps, could he?
A. I do not know. I say I didn't see the first shot. I heard the first shot.
Q. By the time the second shot was fired the crowd was all gone so you could see?
A. Yes, sir; I had a plain view right straight on down.
Q. How far did Charley walk from the time he fired the first shot until he fired the third one?
A. He advanced towards John every time he would shoot him.
Q. Two or three steps?
A. Yes, sir; just walk towards him.
Q. You think he walked in all as much as five or six steps, do you?
A. No, sir; I said two or three steps.
Q. Each time two or three?
A. Yes, sir; that was between these two last two shots.
Q. He did it twice?

A. Yes, sir.
Q. He must have walked as much as five steps at least?
A. Well, that is what I say.
Q. What was Welch doing when Charley was doing the shooting?
A. He got off from him.
Q. Walk off pretty leisurely or pretty fast.
A. Every time Charley would shoot him hee would straighten up this way.
Q. How many times did he straighten up that way?
A. Twice to my seeing.
Q. His back was to him when he shot both times, was it?
142 A. Yes, sir; walking from him.
Q. As he walked from him was his back as much from him as my back is now [indicating]?
A. Yes, sir; kind of angling, going that way.
Q. Sort of angling this way?
A. Yes, sir.
Q. Sort of with his left side to him?
A. I could not tell what side it was.
Q. But he had his back to him both times?
A. Yes, sir.
Q. You were looking towards the north; you were down here with Bob Marshal looking towards the north?
A. Yes, sir.
Q. When Welch went to walk away did he walk north?
A. No, sir.
Q. Which way did he walk; did he walk west or east?
A. He walked angling south.
Q. Angling which way, to the north or south?
A. Wait a minute and I will tell you.
Q. Let's have it.
A. He walked right a little south, a little west, east from him.
Q. More north than east or south?
A. Walked right southeast.
Q. You were south of him?
A. Yes, sir.
Q. Then he walked sort of towards you?
A. No, sir; he was going from me. He was going angling from me.
Q. His back was from you when he walked away?
A. Yes, sir; his back was from Charley, not from me. He had his side to me.
Q. If he walked east he would have his right side to you?
A. Let me explain to you. This is north and south here, and that book there is John Welch's tent, and Charley was standing right there where that piece of paper is when he was shooting John, and
143 John was walking right down this way, and my face was turned to him this way.
Q. Then he would have his right side to you, would he not?
A. Yes, sir; that is right.
Q. Which side was Smith from him?
A. Smith was at his back.

Q. That is the way it was the two last times. Now, you had driven in your carriage from town, I believe, and started up to the fair ground, had you?

A. Yes, sir; I went out there in Mr. Heffner's carriage.

Q. You went out to see the races. How did you get in by that merry-go-around with a carriage?

A. This way where the travel is in is north and south, and coming from town there is a way to go in above this, and come in here back behind that, that would throw the team north and south, and there I gets out of the carriage, and there I meets Mr. Marshal.

Q. Were there any wagons or carriages or anything of the sort in between these tents in that little street?

A. I don't think there was but one team in there, and that was the team that drove in there with us.

Q. The team you were driving wasn't in there.

A. It was in there when I got out of it, but they went back the same way we came out.

Q. Then there was no wagons or carriages in between these tents at the time of that firing?

A. If there was I didn't see them.

Q. You could have seen them if they could have been in there?

A. If there was they were behind me. There was nothing in
144 front of me that I saw.

Q. Did you go past the Herrill stand in going towards the fair ground?

A. Yes, sir; we come right in here and come aro'nd the merry-go-around and come right in here.

Q. There is no street or road that way, is there?

A. Yes, sir; there is an opening for those teams to go in there because they could not turn around in this short lane good.

Q. You didn't go inside of that enclosed lot where these tents were in there?

A. I was right inside of it, right in front of the merry-go-around at the time.

Q. How could you get in there without going in that gate? There is only one gate to go in?

A. Yes, sir.

Q. Where is the other gate?

A. But I didn't go in that gate.

Q. Where is the other gate?

A. There was a way open above this.

Q. There was two gates then?

A. It is where a man had taken down his fence and let these wagons go in there because they could not turn around. There was no gate.

(Witness is shown diagram, and indicates on it his route from Muskogee to the place where he got out of the carriage.)

Mr. MARCUM (of counsel for defendant). Wasn't that fenced up with wire fence?

A. The fence was taken down.

Q. Don't you know it was fenced up to keep people out of there entirely?

A. No, sir; there was hundreds of wagons passed in that way.
Q. Do you know Cookey Brown?
A. Yes, sir.
Q. You have a billiard hall there, haven't you?
145 A. Yes, sir; Brown and I have a billiard hall together.
Q. Did you see Cookey Brown the evening of the shooting?
A. No, sir.
Q. Did you see him at the billiard hall that evening?
A. I don't know whether I saw him or not.
Q. Didn't you see him next morning at the billiard hall?
A. No, sir; I was shot next morning, and I didn't see him if I know it.
Q. Didn't you see Cookey Brown that evening, and didn't you tell him at the billiard hall that if you had been there and had seen that shooting you would have shot Charley Smith yourself?
A. No, sir; I couldn't have told him, for I was in bed sick—shot—and I don't know anything about it at all.
Q. You don't know anything about what at all?
A. After the shooting they put me on a cot and took me home.
Q. You don't know anything about what?
A. About Cookey Brown, because I was shot, and they put me on a cot and took me home. I didn't know anything about anybody then.
Q. Who was helping you to run the billiard hall?
A. Cookey Brown and I were partners.
Q. Wasn't Bob Marshal a partner with you also?
A. Yes, sir; Bob Marshal was my partner.
Q. Were you with Bob Marshal the night before this killing, and John Welch?
A. Yes, sir; Bob Marshal and John Welch and I eat at the same table.
Q. The night before?
A. I expect so. Bob was at the house all the time.
Q. You were together the night before?
A. Yes, sir; I think I was.
146 Q. Bob Marshal was drinking considerable, was he not?
A. I don't think he was any more than ever. I don't think he was drunk.
Q. He was drinking?
A. I will tell you, if he was I don't know whether he was or not.
Q. John Welch had been drinking, had he not?
A. I know that John Welch wasn't drinking, because he hardly ever drank anything.
Q. But you don't know whether Bob Marshal was drinking any or not?
A. He was a little inclined to drink sometimes, but whether he was drinking that night or not I don't know.
Q. He was drinking the next morning, wasn't he?
A. Yes, sir; I expect he was the next morning.
Q. That was the morning he was shot?
A. Yes, sir.
Q. What time of day was this shooting?
A. As near as I could judge it, I think it was between 10 and 11 o'clock.
Q. Don't you know they never had any races until afternoon? You say you had started out to the races?

A. Yes, sir; I went out to the races every day before dinner.
Q. But they didn't have them until afternoon, did they?
A. No, sir.
Q. What did you go out there for that morning to the fair ground?
A. I went out to the races to get some pointers on some horses, because a horseman told me to come out there and he would put me on something.
Q. Did you go?
A. I would have gone if the trouble hadn't commenced. I got shot was the reason I didn't go.
Q. How long had you been out there before the trouble commenced?
A. I expect about five minutes.
147 Q. How did you happen to go away around down that way instead of going down to the fair ground and getting your pointers on the horses?
A. This place was above the fair ground.
Q. That is not the way to go from town to the fair ground?
A. I was going in there to look around and see my people.
Q. You were not hunting for any points on races down there?
A. I never had gone to the fair ground without stopping at this place.
Q. You went to see Bob Marshall—wasn't that one of the points you went to see?
A. No, sir; not particularly.
Q. You went down there for the purpose of seeing Bob Marshall, didn't you?
A. No, sir.
Q. You didn't know he was down there?
A. I knew he was at the fair ground.
Q. Have you ever been charged with any offense? Were you ever arrested?
A. Yes, sir.
Q. How many times have you been arrested?
A. I have been arrested twice.
Q. What for?
A. Once for playing poker and the other time for shooting craps.
Q. Anything else?
A. No, sir; I have been arrested for gambling is all.
Q. You never was arrested for murder?
A. Yes, sir.
Q. You didn't think of a trivial thing like that?
A. I thought you meant for in this country. I was arrested in Arkansas.
Q. How many times?
A. Once or twice.
Q. Once for murder. What was the other time?
A. Shooting craps.
148 Q. Where else have you been arrested?
A. Nowhere else.
Q. Did they convict you in all the cases?
A. No, sir; I am on bond now for shooting craps and playing poker.
Q. What did they do with you for shooting the man?
A. I beat that case.
Q. You were shot by Mr. Bennett?

A. Yes, sir.

Q. Which way were you going when Mr. Bennett shot you, with regard to town? Were you going towards town?

A. He shot me right in the gate.

Q. You were going towards town?

A. Yes, sir; I had started to town.

Q. Had you turned towards town when you were shot?

A. No, sir; he shot me right in the middle of the gate.

Q. Where was Mr. Bennett when he shot you?

A. I didn't see him at all. I reckon he was standing close there by the fair ground gate.

Q. You were between him and town?

A. Yes, sir.

(Witness excused.)

149 DAVID HARRISON, having been duly sworn upon behalf of the Government, was examined in chief by Mr. J. B. McDonough, the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?

Answer. Choska.

Q. Were you in Muskogee on the day that John Welch and Robert Marshal were killed?

A. Yes, sir.

Q. Did you see the killing?

A. Yes, sir.

Q. Tell us what you saw there.

A. Well, I only saw the shooting of Welch, and I never heard a word that was passed between the two men, Welch and Smith.

Q. Where were you standing?

A. I was standing right between Welch's stand and Tackey Grayson's stand.

Q. Tell us what you saw.

A. I was standing there and I saw Smith coming, running out with a pistol, and directly he shot Welch; and he made three shots on him, and whether he hit him these three shots I could not say, but he fired on him three times.

Q. Was Welch doing anything in the meantime?

A. No, sir; he wasn't doing anything that I seen.

Q. Go ahead. Did Smith say anything?

A. If he did I never heard him.

Q. Well, go ahead.

A. And Robert, after the shooting of Welch the third shot, after he made the third shot on Welch, Robert he came running south of where Smith and Welch was, and after he run up such a distance he halted Smith, told him to drop the pistol, and consider himself under arrest.

150 The COURT. That is Robert Marshal?

The WITNESS. Yes, sir. Smith then made answer to him, "What in the hell is the matter with you?" an' then he fired.

The ASSISTANT DISTRICT ATTORNEY. Who fired?

A. Marshal.

Q. What did Smith do?

A. Smith returned the shot.

Q. What took place then?

A. Just after this Jim Smith he came right in behind Charley, and told him to "Come right in here, Charley," and they both went in right under a wheel of fortune, and that is the last I saw of them.

Q. What was Charley Smith doing at the time that Robert Marshal fired?

A. It seemed like he was making it from over on the east side of the street.

Q. Which way did Marshal fire? How was his pistol when he fired?

A. He had his pistol throwed right down that way towards Smith.

Q. Did you hear him say anything else further than what you have already stated?

A. No, sir; I never heard him say anything else.

Q. What was Charley Smith doing with his pistol at the time that Marshal fired?

A. He just had it hanging down that way to his side.

Q. Did he fire then?

A. No, sir; he didn't fire until Robert fired.

Q. He fired after Robert fired?

A. Yes, sir.

Q. Then he fired at Robert, did he?

A. Yes, sir.

Q. Did Robert fall off his horse, or not?

A. Yes, sir.

Q. And then Smith run off, did he?

A. Yes, sir.

151 Q. Did you see him go into a tent anywhere?

A. No, sir; I did not see him go into a tent.

Q. Do you know how many times Charley Smith fired?

A. Fired four times.

Cross-examination by Mr. THOMAS MARCUM:

Q. Fired four times?

A. Yes, sir.

Q. The three first shots went west?

A. Yes, sir.

Q. They were fired in rapid succession, were they not, one right after another?

A. No, sir; they wasn't.

Q. How were they fired, then?

A. Every time he would shoot Welch he would drop his hand and let the pistol hang down, and then he would raise and shoot him again.

Q. He would shoot that way, and then let it down, and then come up again, and then shoot again, and then down again, and then up again?

A. Yes, sir.

Q. He took a good deal of time about it?

A. He didn't seem to be in a hurry about it.

Q. Just seemed to be working along at his leisure?

A. Seemed to be taking good time; yes, sir.

Q. Where was you, Dave?

A. I was right between Welch's stand and Tackey Grayson's.

Q. Do you mean you were actually between them?
A. I was between the two stands. My aunt had a stand right in between there, and I was standing right up with my back to her.
Q. Don't you know that Tackey Grayson's stand and John Welch's were connected together, and had been moved that morning,
152 and Charley Smith helped Welch to move his tent up there?
A. No, sir.
Q. Don't you know that?
A. No, sir; I don't.
Q. Do you say that Welch's tent didn't join Smith's?
A. Well, to my recollection it don't seem like it was.
Q. Do you know? You say your aunt had one in between them?
A. I am positive she did.
Q. You are positive she did?
A. Yes, sir.
Q. Then you are positive that Smith's tent and Welch's were joined together?
A. No, sir.
Q. Had Welch moved his tent that morning?
A. No, sir.
Q. The evening before?
A. I wasn't there the *evidence* before.
Q. Had he, any time?
A. I wasn't there after that either.
Q. Before that? Had he moved his tent?
A. No, sir; I don't know anything about that.
Q. Who was it had the tent between Smith and Welch?
A. My aunt.
Q. Who was she?
A. Dinah Marshal.
Q. How much space was there between Dinah's tent and Marshal's?
A. There wasn't any space between them at all. They were all joined right together.
Q. How far is it from Smith's tent to Dinah Marshal's?
A. I don't know anything about Smith's tent.
Q. You don't know Smith's tent at all?
A. No, sir.
Q. You didn't know he had any, did you?
A. No, sir.
Q. You don't know he had two there?
A. No, sir; because I wasn't there long enough.
153 Q. You didn't know Smith was there either, did you?
A. Yes, sir; I knew he was there.
Q. Were you in your aunt's tent?
A. No, sir; I wasn't in there.
Q. Where were you, then?
A. I was on the outside of the tent.
Q. You state you were between Smith's and Welch's tent?
A. I was between there, and her tent is between the two tents.
Q. How could you be between them if you were not in her tent?

A. I didn't have to go in there because her tent was in between Welch's and Tackey Grayson's, and I was on the outside of it; I was not on the inside.

Q. Tackey and Smith were together there, were they not?

A. I don't know that.

Q. How could you be between Tackey's tent and Welch's tent when your aunt's tent was between them, unless you were in the tent?

A. There was an outside the'e, an' I was standing on the outside.

Q. You were on the outside?

A. Yes, sir.

Q. How long had you been out there?

A. I hadn't got there over an hour.

Q. You were standing right there for an hour?

A. Not right there.

Q. Where did you come from to that point?

A. I came from home.

Q. How long had you been at that place?

A. I wasn't there over ten minutes, I don't suppose.

Q. Where did you come from to that point between these points?

A. How is that?

154 Q. Where did you go from to that place?

A. Oh, I came f'om where I had my horse hitched. I just hitched my horse and came right up there and stopped, and was talking with my sister.

Q. Up where?

A. Up to my aunt's stand.

Q. You hitched your horse in the street?

A. No; I just hitched my horse and come up there.

Q. Where did you hitch your horse?

A. South of where the shooting occurred.

Q. Outside of the tent row?

A. Yes, sir.

Q. How far from the merry-go-around?

A. Oh, I don't know; about 100 yards.

Q. How far is the merry-go-around from Tackey's tent?

A. Oh, I don't know.

Q. About how far? About how many steps?

A. Oh, I could not tell.

Q. Well, about how many?

A. Oh, I could not tell you.

Q. Can't you guess at it? 100 yards?

A. No; I don't think it was 100 yards.

Q. It is pretty nearly 100, is it not?

A. I have no idea just how far it is exactly; between 50 and 100 yards.

Q. The merry-go-around was southwest of Tackey's tent, was it not?

A. I never paid much attention to that, whether it was southwest or where.

Q. The merry-go-around was entirely outside of this tent row, wasn't it?

A. Yes, sir.

Q. It was on the west side of the tent row, wasn't it?

A. Yes, sir.

Q. How far was the merry-go-around from the tent row—the
155 tent row on the west side of that lot there?
A. I could not tell you that, either.
Q. But it was between 50 and 100 yards from the merry-go-around to that tent?
A. Yes, sir.
Q. And you had hitched your horse about 100 yards from the merry-go-around?
A. Yes, sir.
Q. Did you come any nearer, back be'ind all these tents?
A. No, sir; I came in north of there.
Q. You came in at the main gate, at the main street?
A. Yes, sir.
Q. There is not but one street there that passes the fair ground, is there?
A. That is all I know of.
Q. That is on the north side of the fair ground, is it?
A. That is north of the fair ground.
Q. They run east and west from town?
A. Yes, sir.
Q. By the big schoolhouse there?
A. Yes, sir.
Q. And this tent row runs south from that street?
A. Yes, sir.
Q. You came in at that tent row gate, didn't you?
A. Yes, sir.
Q. And went south?
A. Yes, sir.
Q. Went on through the tents, and back beyond the merry-go-around?
A. Yes, sir.
Q. Now, there is no street back there at all, is there?
A. If there is I never saw any.
Q. There is no way to get in or out back there? Severs's pasture is south of that, is it not?
A. No, sir; it wasn't fenced back there.
Q. Don't you know that Severs's pasture is back there, and it has got a wire fence all around it?
156 A. I am telling you there was a fence back there.
Q. And that he keeps his pasture there, and stock?
A. I don't know where Severes's pasture was, but there was a fence back there.
Q. There is a big pasture south of this tent row, isn't there?
A. I don't know whether it is a big pasture or not, but the whole outfit, merry-go-around and all, was in a little pasture around there, where it was fenced in.
Q. That is in a lot right back of the peach orchard?
A. Yes, sir.
Q. There is not any street there, is there?
A. If there is I didn't see any.
Q. There is no way possible to go from the merry-go-around down town west, was there?
A. No, sir; I don't think there is.

Q. You have to go back through this tent row, and out at the north gate?

A. Yes, sir.

Q. You had been standing there about ten minutes. What was your business there at that place when the shooting began?

A. I was talking with my sister.

Q. Who?

A. Martha.

Q. Martha who?

A. Martha Harrison.

Q. Where was Martha when the shooting began?

A. She was on the inside there.

Q. She had run in before?

A. No, sir: she was already in there.

Q. Do you know where Charley Smith's dance hall was?

A. No, sir; I do not.

157 Q. Wasn't there a dance hall a little southeast of where you stood, on the other side of that street?

A. Well, there was several dance halls there. I didn't pay much attention to them.

Q. Well, one particularly, that was weatherboarded up with plank, a little southeast and diagonally across the street from where you stood there?

A. I think it was, if I am not mistaken.

Q. Do you remember how it was fixed up?

A. No, sir; I didn't pay any attention to it.

Q. Do you remember whether it was tent or plank there?

A. No, sir.

Q. You can't tell whether it was plank?

A. No, sir; because I didn't pay any attention to it.

Q. Did you see any plank house there?

A. No, sir.

Q. You don't remember any?

A. No, sir.

Q. You won't say there was any, will you?

A. No, sir; I do not remember of seeing any.

Q. Where did you first see Marshal when you were standing there?

A. I saw him come in there at the front gate, running from Muskogee east and west. He was going down to the main fair ground, and I saw him when he rode in the gate and went on around south of these stands.

Q He came in at the north gate and rode south, did he?

A. Yes, sir.

Q. Rode south right down through these tents?

A. Yes, sir.

Q. How long was that before the shooting?

A. I could not tell you, but it didn't seem like it was very long to me.

Q. About how long?

A. I could not say how long.

Q. Where was John Welch as the marshal passed through there?

158 A. I never saw him.

Q. Where was Charley Smith?

A. I never saw him, either.
Q. Was there any wagons in the tent street there at that time?
A. At the time the shooting occurred I didn't see any.
Q. When Bob Marshal went through was there any?
A. I think there was.
Q. Where did Bob go to?
A. I don't know where he went to.
Q. Did he go out of sight?
A. Yes, sir.
Q. Where did you next see him?
A. When I next saw him he was hailing Charley.
Q. Where was he then?
A. Sitting on his horse.
Q. South of where Charley was?
A. Yes, sir.
Q. How far?
A. About 15 or 20 yards, I suppose, or maybe further.
Q. Did you see anybody else there when you saw Marshal?
A. Yes, sir; I seen a lot of folks.
Q. Who?
A. I could not tell you who they were all. They were all running to get out of the way.
Q. Had Bob Marshal just appeared on the scene then?
A. Yes, sir; he had just come there.
Q. Did you see him coming?
A. I never until he hailed.
Q. Was there anybody standing by the horse that he was on?
A. I don't know; I could not say that.
Q. Was his horse standing still?
A. It seemed like he was.
Q. Was anybody standing near him on the ground on foot?
A. I don't know whether there was or not.
Q. You saw him?
A. Yes, sir; but I didn't notice for anyone else.
159 Q. If anybody had been standing there by Marshal, you could have seen him, couldn't you?
A. No, sir; I could not have seen him.
Q. Why? If you saw Marshal standing on the horse, you could have seen a man there as well as the horse, could you not, if there had been a man there?
A. I guess so.
Q. Did you see any?
A. I don't remember of seeing any.
Q. Was there any man there?
A. I don't know; I don't remember of seeing any.
Q. How long did Bob Marshal stand there?
A. He didn't stand a long time.
Q. He was standing there, you say?
A. He was setting on his horse, and it wasn't long until he was shot off.
Q. He was sitting on his horse?

A. Yes, sir.
Q. How long did he set on his horse?
A. I could not tell you; I didn't have any timepiece.
Q. About how long?
A. I could not tell you that, either.
Q. What did he say to Smith?
A. Told him to drop that pistol and consider himself under arrest.
Q. What did he do then?
A. He didn't do anything, only he had his pistol throwed down that way [indicating].
Q. Down on who?
A. It seemed like he had it on Smith.
Q. What did Marshal do then?
A. When Smith spoke to him, then he shot.
Q. Marshal shot?
A. Yes, sir.
Q. Where did the ball hit him?
A. I don't know; I never saw where the ball struck.
Q. Which way was Smith's back when Marshal shot first?
160 A. Smith was very near over there on the other side of the street when he shot.
Q. Which way was Smith looking when Marshal shot at him first?
A. I don't know which way he was looking. It seemed like he was looking towards him.
Q. Did you not say a minute ago that Charley whirled around when he shot at him, and said, "What have you got to do with it?"
A. No, sir.
Q. Didn't you say that he turned around and said that?
A. No, sir.
Q. What did you say?
A. I said he said, "What is the matter with you?" He didn't say anything about "what you have got to do with it."
Q. Didn't you say that he whirled around and said that?
A. No, sir.
Q. Did he whirl around?
A. I don't know whether he whirled or not, but he answered him.
Q. Which way was he looking?
A. He was looking towards him.
Q. You said awhile ago that you didn't know which way he was looking. Now, which way was Charley Smith's back when Marshal shot at him?
A. Looked like his back was a little northeast of where Marshal was.
Q. Where was his breast?
A. His breast was a little southwest.
Q. Did you see Prof. Triggs there.
A. I never noticed him.
Q. You saw a lot of women around Welch's, didn't you; his tent?
A. I didn't see a lot; I saw a few there when I first got there.
161 Q. Wasn't they there when this shooting occurred?
A. I don't know whether they were or not.
Q. Why don't you know?

A. Because I wasn't paying any attention.
Q. You don't notice women?
A. No, sir.
Q. Then you can't say whether there were any women there or not?
A. There was a few around there.
Q. But at the time of the shooting?
A. Well, there may have been some there, but I didn't see them.
Q. Was there any?
A. There may have been a few there, but I never noticed them.
Q. If they were there you didn't know it?
A. I am positive they were there, but how many I don't know—a few of them.
Q. Did you see them?
A. Yes, sir; I saw them.
Q. When did you see them?
A. I have been seeing them ever since I first got there.
Q. Then you saw them during the shooting?
A. I saw them running, of course.
Q. You stated awhile ago you didn't know whether there was any there or not—that you didn't see them.
A. I told you there was a few there.
Q. You said there was a few there just before.
A. No, I didn't say anything about that.
Q. You said there was women there just before that, but at the time of the shooting you didn't know there was any there or not.
A. I didn't say that, either.
Q. What did you say about it, now? Was there any women there when that shooting took place?
162 The ASSISTANT DISTRICT ATTORNEY. He has answered that three or four times.
Mr. MARCUM (of counsel for defendant). You state no, I believe.
A. I said there was some women there—a few of them.
Q. At the time of the shooting?
A. Yes, sir.
Q. Where were they?
A. They were all backward and forward on the street there.
Q. Who were they?
A. I don't know who they were.
Q. Whereabouts were they?
A. On the outside of the street.
Q. Outside of what street?
A. I mean on the outside of the tents, going backward and forward.
Q. Which way were they going?
A. Some were going out of where the tents was and some were going in.
Q. Can you tell anybody you saw there—any women?
A. No, sir.
Q. Whose tent did they go in?
A. They were not going in any tent.
Q. Whose tent did they go out?
A. I never saw them go out of any.

Q. Didn't you tell Dave Roberts the evening after the shooting that Bob Marshal rode up there and shot Charley without saying anything to him about it?

A. No, sir; I did not.

Q. You didn't see him, did you?

A. Yes, sir; I saw him.

Q. You saw him out at Pecan Creek?

A. Yes, sir.

Q. Met him?

A. Yes, sir.

Q. Told him about this?

A. Yes sir.

Q. Didn't you tell him that Bob rode up there and shot at him without saying anything at all?

163 A. No, sir; I didn't tell him any such word like that.

Q. Did you hear Charley Smith say anything to Welch?

A. No, sir; I never.

Q. Did he say anything?

A. I don't know whether he did or not; if he did I didn't hear it.

Q. You could have heard it, could you not?

A. It seems like I could.

Q. How many steps were you from him when he shot?

A. I wasn't very far over five or six steps from him.

Q. What did you do when he shot?

A. I didn't do anything.

Q. Did you ask him to stop?

A. No, sir.

Q. Did you try to prevent him?

A. No, sir.

Q. Or anybody else?

A. Not that I seen.

Q. You just stood right there and looked at him?

A. Yes, sir.

Q. The distance across from one tent to the other isn't over 15 or 20 feet, is it?

A. I don't think it is.

Q. Marshal told Smith to throw that pistol down and consider himself under arrest?

A. That is just what I understood him to say.

Q. Didn't he hollo halt?

A. I didn't understand him to say halt.

Q. Did Charley Smith whoop?

A. If he did I never heard it.

Q. Have you ever been convicted for anything here?

A. Yes, sir.

Q. How many times?

A. Just once.

Q. What for?

A. Well, I was accused of larceny.

Q. And convicted?

A. Yes, sir.

164 Q. When?

A. I could not tell you when. It has been about eight or nine years.

Q. How many times have you been charged with it?

A. Just once.

Q. What did they do with you when they convicted you of larceny?

A. They didn't do anything with me. The chief turned me lo'se.

Q. The chief did?

A. Yes, sir.

Q. How often have you been in this court?

A. Just once.

Q. What did they do with you?

A. I came clear before the commissioner.

Q. Is that the only time you have been here?

A. That is the only time.

Q. The chief turned you out?

A. Yes, sir; the chief reprieved me.

Q. Is that all the time they got you for stealing?

A. Yes, sir.

Q. What did you steal?

A. I never stole anything, only I got a lot of property that my brother let me have.

Q. You got ahold of a hog or something else that belonged to somebody else?

A. It was a horse.

Q. It didn't belong to you?

A. It didn't belong to me——

Q. That is all; stand aside.

(Witness excused.)

165 FRANCIS BROOKS, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?

Answer. I live in Neodasha, Kansas.

Q. Were you in Muskogee last September; the latter part of September?

A. Yes, sir.

Q. Were you present there out near the fair ground at the killing of Welch and Marshal?

A. Yes, sir.

Q. I wish you would tell what you saw of that matter. Go *on* in your own way and tell all about it.

A. Well, I was there at the fair, and went up where Mr. Welch—I suppose that was the man that was killed—the first man that was shot, anyway——

Q. What time in the day?

A. I could not tell you hardly, because it slipped my memory, and I never paid any more attention to it, and he was running a chuck-a-luck game, sitting on a stool, at the time I stepped up there.

Q. Who was doing that?

A. The first man that was shot.

Q. John Welch?

A. Yes, sir; I suppose so. Someone came up, and I never paid any attention to who it was; was swearing there and holloing around, and just as I looked around this man Smith, I believe, supposed to be him—I didn't know him at that time——

Q. Is this defendant the man?

A. I could not identify him at all, because I never paid any attention to him until the time he stepped up there, and then I never paid enough attention to know who he was afterwards. He stepped
166 up, swore an oath, I believe, and hit his fist on where he was running the chuck-a-luck, and wanted to know if he was going to hold up for this driving through there, or something—words to that effect, anyway—and if he wanted to have anything out of him to get it; and by that time this gentleman got off his stool he was sitting on and walked out to the door, and as he walked out I grabbed him by the arm, and I says, "Mister, you had not better go out there; you are liable to get into trouble;" and he said, "Turn me loose," and swore an oath; and I turned him loose, of course, and stepped on the inside. I was rather standing on the inside and outside of the door together. As he started out, this other gentleman that first came up there and hit his fist where he was run'ing the chuck-a-luck game, turned around and came back with a gun, and it seemed to me when they met one another——

Q. What do you mean by a gun?

A. I mean a revolver.

Q. Go ahead.

A. When he came back it seemed to me as though when they met one another they didn't either one see one another—they just run up against one another. He says, "You are going to hold up for this," or words to that effect; I don't know just exactly.

Q. Who said that?

A. The man that had the pistol.

Q. Call him Smith.

A. Mr. Smith, then. And by that he stepped back and cocked the gun, and this man turned around, and as I seen him cocking the gun it seemed to me that he shot one in his hip, and I believe that he shot two more shots, and one of them—that is, hit him two more shots. He shot four shots at him and hit him three shots; that is, just from the appearances of things. They wouldn't let me in where he was after-
167 wards. I wanted to get in afterwards, but they wouldn't let me in.

Q. What did the man Welch do? What was he doing when the other man shot at him?

A. He was just walking off, and he walked right into the tent and set down on a seat they had there—a board seat they had there—dance hall, I believe.

Q. What occurred then?

A. After he had shot at him someone shot from behind. I was in the tent there; I had stepped in the tent at that time. And Mr. Smith was over on the outside, I expect it is about 30 feet or 35, I don't know just the distance; anyway, across the lot there, and someone shot from behind while he was shooting at this other man, and he turned around and shoots

at him, and stands there and cocks his pistol three or four times after the loads was all shot out, and by that time there was another gentleman run in the tent where I was and put his hand in a clo'*se* basket—I supposed he was going after something to eat—and came out with a six-shooter, and I thought it was time for me to make my escape, and so I got out of there.

Q. Did you see the man that fired the shot at Smith?

A. No, sir; he was so far back that I could not see him. There was some ladies in there, and they were making such a racket; and I told them to keep still; that wouldn't do any good, and so when the*y* man came in after his pistol I run and got out of there.

Q. That shot was fired at Smith, and then Smith fired one more shot, did he, after that?

A. He stood there; I don't know just how many shots he fired after that. I could not tell you exactly, but he stood there and shot all the loads out. I know that, because he stood there and snapped his gun three or four times after he turned around and shot at this other man.

168 Q. Did you know at whom he was snapping his gun?

A. No, sir; I didn't know anything about it.

Q. What did he say, if anything?

A. Well, sir, I don't know that he said anything.

A JUROR. Did you hear any words from this man back where you spoke of this shot being fired?

A. No, sir; there was such a noise, such an exciting time right at the present, that a person would not pay any attention to such things.

Cross-examination by Mr. C. J. FREDERICK:

Q. Where do you live?

A. In Neodasha, Wilson County, Kansas.

Q. What were you doing down there at Muskogee?

A. I came from Neodasha to Vinita to meet my brother-in-law, to run a shooting gallery there, to go hav*e* interest in a shooting gallery. When I got there he had gone. I didn't get there on the day; I supposed I would catch him at Muskogee, at the fair there, with his shooting gallery, but instead of that when I got there he was gone, and I just staid until the fair was over.

Q. You are a white man, are you?

A. Yes, sir.

Q. What were you doing up there among these colored people—around there with their chuck-a-luck games?

A. I was acquainted out there, and I was just out there standing around, looking on like anybody else would do.

Q. Acquainted with who?

A. A gentleman from Southwest City by the name of Stansberry.

169 Q. You were out there with Stansberry?

A. Yes, sir; my wife was at his tent while I was knocking around out there where these people were.

Q. Out there where these people were running these *cuh*ck-a-luck games and crap games and negro dance halls.

A. No, sir; I wasn't in no negro dance halls.

Q. You were not camped in that lot, were you?

A. No, sir; I wasn't camped at all. I had a room at a private house up in town. The man was a line repairer on the M. K. & T.

Q. What business did you have down there among these tents where these colored people were?

A. I told you I was just looking around like anybody else would do. I had no particular business at all.

Q. Looking for what, down there?

A. Looking around. I suppose when you go to a circus, or any place like that, you would stand there and not look any place.

Q. That wasn't a circus.

A. I know it, but there was men gambling there, and a man has got a right to stand there and look on.

Q. You are not a gambler?

A. No, sir.

Q. You don't play chuck-a-luck?

A. No, sir.

Q. You don't play craps?

A. No, sir.

Q. Poker?

A. Sometimes I play a little game of poker, once in a while.

Q. What were you doing with John Welch when he was playing chuck-a-luck?

A. I was standing there looking on.

Q. Who was he playing with—you?

A. No, sir.

Q. Was there any betting going on there?

A. No, sir.

170 Q. Was there any other white man there with you?

A. No, sir.

Q. Did you see any other white man there at all?

A. No, sir; I didn't, right at that place.

Q. Stansberry wasn't there, was he?

A. No, sir.

Q. You are the only white person you saw there?

A. Yes, sir; I am the only one, I believe. There was white persons al' around through the crowd.

Q. Right in that tent row?

A. Yes, sir; that is all I saw in there.

Q. You were acquainted with Mr. Welch, were you?

A. No, sir; I was not acquainted with anyone there.

Q. You didn't know Smith?

A. No, sir; I never seen him until he commenced to shoot, and then I didn't know his name; did not know who he was.

Q. You were not trying to put up a shooting gallery there in that place, were you?

A. No, sir; I was aiming to run the gentleman that run the shooting gallery at Vinita.

Q. You aimed to meet your brother-in-law?

A. Yes, sir.

Q. You didn't expect to meet him in that crowd?

A. I did not know but what perhaps I would; that he would be down there.

Q. You thought you would find him in that crowd?

A. Not exactly in that crowd. You can't tell where a man will be; he might be knocking around.

Q. How long had you been at Muskogee?

A. I wouldn't say, because I don't know just exactly how long I had been there.

Q. Had you just come in that day?

A. No, sir; I had been there a day before that at least.

171 Q. You say John Welch and this man were playing chuck-a-luck?

A. I said he was running a chuck-a-luck game, and this man they call Smith came in and put his hand down on the table that way and swore an oath.

Q. And wanted to know if Welch was going to uphold this driving through there, did he?

A. Yes, sir; words to that effect.

Q. Welch hadn't been saying anything before then?

A. Not that I know of.

Q. How long had you been with Welch?

A. I don't know that I had been with Welch; I never run around with him. I just stepped up and was looking around like anybody else would do.

Q. How long had you been there at that game?

A. That is something I could not answer. I might have been there a minute or two minutes or five minutes or six.

Q. Did you see wagons or teams in that little street between the tents?

A. Well, there was wagons and teams driving through there pretty near all the time.

Q. About this time?

A. No, sir; I never noticed.

Q. How do you know they were driving through there pretty near all the time? Had you been there before?

A. Yes, sir; I had been on that place before.

Q. Frequently?

A. I had been up and down there. I staid in Mr. Stansberry's tent most of the time.

Q. His tent wasn't in the lot, was it?

A. Yes, sir; it was.

Q. It was in the same lot where the killing occurred, was it?

A. It was in that same row of stands, along there where this killing occurred.

172 Q. How far was that from the race tracks?

A. The race tracks were right over the fence, on the other side there.

Q. When this man Smith came and knocked on the table and swore an oath and asked him if he was going to uphold this driving through there, you say Welch got up and started out there?

A. Yes, sir.

Q. Did Welch curse any?

A. I don't remember whether he did or not.

Q. Did he use any words?

A. I could not tell you whether he did exactly or not. It seemed to me like there was a good deal of swearing around there. I don't know just exactly who they were. I never paid much attention to it until he got up and started out there.

Q. Then I reckon you paid attention to what he said, did you not? What did he say when he got up and started out there?

A. I believe Smith said if he wanted anything out of him he could get it, or to get it. He came out and swore an oath, and Mr. Welch swore an oat', I believe, and walked out.

Q. What did he say?

A. Do you want me to relate the circumstances exactly?

Q. Certainly.

A. Mr. Smith said "God damn you, if you want anything out of me come out here," and Welch got down and said "By God, I am coming."

Q. You didn't see any arms?

A. No, sir; neither one had a weapon of any kind that I know of at that time. As Mr. Welch started out Mr. Smith turns around——

Q. What did Welch do and say after Smith went away?

A. It was just done in a minute, very near everything.

173 Q. During that minute what did Welch do before he came back with the gun? What did Welch say while Smith was gone after the gun?

A. I never paid any attention to what Welch said. I don't know that he said anything.

Q. Did he go out there and stand?

A. No, sir; I told you that he hadn't any more time to go where Smith was when Smith told him to come out, and Smith turned around and met him right close to that place by the time he got back with the gun.

Q. I don't understand how he can meet Smith when he is going off to get the gun?

The ASSISTANT DISTRICT ATTORNEY. It is very clear what he says.

Mr. C. J. FREDERICK (of counsel for defendant). How far d'd Welch follow out after Smith?

A. As soon as he started out Smith went out and got a gun somewheres.

Q. How far did Welch go towards Smith?

A. He walked around towards wher' Smith was standing, and Smith he met him right there. It seems they met; they run right up facing one another.

Q. You don't seem to explain yet. Welch goes up to Smith—goes out that way, and Smith goes on to get his gun. You didn't see where he went, did you?

A. No, sir.

Q. He went out of your sight?

A. Yes, sir.

Q. Welch went on in the same direction that Smith did, did he?

A. He didn't follow Smith from where Smith started from.

Q. Smith started from the tent where he knocked on the box?

A. Yes, sir.

Q. Didn't Welch go after him after Smith left there?

174 A. I don't know how to explain it to you. I can't explain it. You won't give me a chance to explain it.

Q. When Smith goes up and knocks on the tables that way, he is there close to Welch then, and then he invites him out, and Smith goes away, doesn't he?

A. Yes, sir.

Q. Welch goes out of the tent himself, does he not?

A. Of course he went out of the tent.

Q. In going out of the tent, did he go towards the way that Smith went?

A. He went to where Smith was in the first place.

Q. How far was Smith from there?

A. Right close to the tent, close enough to put his fist on the stand.

Q. Smith left there?

A. Yes, sir.

Q. Welch left there too?

A. Yes, sir.

Q. He pulled away from you; you tried to stop him?

A. Yes, sir.

Q. How far did Welch go from that tent?

A. That is something I could not tell you.

Q. About how far?

A. I would not state it, for I don't know.

Q. As far as from me to you?

A. I could not say, because I could not explain the number of feet that he went. I would not try to explain it.

Q. About how far? Don't you know the distance? Don't you know what distance is?

A. Yes, sir; but I don't know how far, and I would not say.

Q. How far am I from you?

A. I don't know.

Q. You can tell about, can't you?

A. I judge you are about 12 feet.

175 Q. Judging now with that same judgment, about how far did Welch go from the tent?

A. He went about 12 or 15 feet from the tent, I should judge.

Q. He had gone that distance, and Smith had gone off somewhere and came back in sight. How far was Smith from the tent where the chuck-a-luck game was, and where——

A. That is just what I said in the start; when they met they were about 12 or fifteen feet from me.

Q. After he came back with the pistol?

A. Yes, sir.

Q. You were about 15 feet off?

A. Yes, sir.

Q. Then he had gotten up where Welch was?

A. They both met right there together.

Q. Did they say anything to each other when they got together, after Smith had got the pistol?

A. Mr. Welch says nothing. Mr. Smith says, "I guess you are going to settle with me," or something to that effect. He meant he was going to hold up for those that were driving in there, and Smith stepped back about one step, and the other man stepped back as soon as he seen the gun, and Smith cocked his gun, and elevated it and shot.

Q. Very deliberately?
A. Yes, sir.
Q. Didn't do it quickly?
A. Yes, sir; he did.
Q. Just levelled it down on him?
A. Yes, sir.
Q. How long before he fired the next shot?
A. Just as soon as he could cock his gun.
Q. How many shots did he fire at Welch?
A. He fired four shots at Welch.
Q. How many shots hit him?
A. I would judge three, I think, hit him. That is what I think.
176 Of course I don't know anything about it.
Q. Were they standing face to face?
A. They were when they first met.
Q. When the first shot was fired?
A. No, sir.
Q. How were they standing when the first shot was fired?
A. Welch was in the act of turning around, I believe, when Smith shot, or did turn around.
Q. Had he turned around when Smith shot?
A. I could not tell you exactly, but I think he had. He was in the act of turning around anyway. I thought he hit him in the hip. Of course he had to turn around to hit him in the hip.
Q. The first shot you think hit him in the hip?
A. Yes, sir; I do.
Q. Did you see anybody else around there at that time?
A. Not that I knew.
Q. Did you see any other people there?
A. My goodness alive, the whole place was full of people. Of course there were lots of them there.
Q. Do you recognize any of the faces here?
A. Yes, sir; I do.
Q. You know the names now, don't you?
A. Mrs. Welch is the only one I recognize now.
Q. Where was she?
A. She was in the tent.
Q. Anybody else in the tent with her?
A. Well, there was some more ladies there.
Q. How many?
A. I could not tell you. Two or three, or three or four; somewheres along there. I don't know exactly how many.
Q. Did you see Ella London?
A. I don't know her?
177 Q. Did you see John Jacobs there?
A. I don't know him.
Q. Tell us the name' of some people you did see there?
A. I told you I wasn't acquainted with anybody in Muskogee.
Q. You have seen them here?
A. I told you I saw Mrs. Welch here. I know her because someone told me who she was, and I know her for the simple reason when John

got shot she says, "John is shot," and put her hands on my shoulder when I was in the tent, and of course I was paying attention to the shooting; they were kind of hammering me around and I didn't want to get beat up with the rest of them.

Q. Have you l'arned the names of any of the other witnesses here?

A. No, sir.

Q. Since you have been here?

A. No, sir; no one except John Stansberry. I am well acquainted with him.

Q. Was he there?

A. He was in his tent at the time of the shooting; when it was going on, I believe. At least he said he was.

Q. Did he see it?

A. I could not tell you.

Q. Could he have seen it from where he was?

A. I believe he could have seen——

Q. Could he have seen it from where he was in his tent?

A. Yes, sir; he could have seen it.

Q. How long had Welch's wife been there at that tent?

A. I don't know anything about it.

Q. Was she at the tent when you went there?

A. I don't know that.

Q. You recollect of seeing her there?

A. Yes, sir; at the time of the shooting, and of course I would not pay any attention to her before the shooting. It would be none of my

178 business where she was.

Q. You don't know how long she had been there before the shooting?

A. No, sir.

Q. You don't know whether she was there when you went there or not?

A. No, sir; I don't.

Q. You had been there not exceeding five minutes?

A. Yes, sir; I told you I didn't exactly know the time.

Q. That is your idea?

A. Yes, sir; I had been there a few minutes, anyway.

Q. After this man had fired the four shots at Welch you say you heard another shot fired?

A. Yes, sir.

Q. From where?

A. From behind him, it seemed to me as though it was, because he drawed himself up like a man would if a man would shoot at him or try to hit him.

Q. Who drawed himself up?

A. Smith. And he turned around, and as he turned around he shot, and as he stood there he snapped his pistol three or four times.

Q. Snapped his pistol at the fellow that was shooting at him?

A. Yes, sir.

Q. Did you see the man that was shooting at him?

A. No, sir.

Q. Why didn't you see him?

A. I could not see through an inch board. I was inside of that tent.

Q. You were inside of the tent?
A. Yes, sir.
Q. How could you see Smith through an inch board?
A. There was a little hole there about four feet——
Q. You were peeping through a hole, were you?
A. No, sir; there was about four feet space there in the door.
179 They had gone off about fifteen feet from the tent.
Q. Had they gone out immediately in front of the tent?
A. Yes, sir; it occurred—well, now, I don't know which way that ground lays.
Q. You can tell whether it was in front. Did it occur in front of the tent?
A. It occurred at the right-hand corner of it here, and this gentleman that got shot first kind of moved off to the northeast—that is, laid off north and south there—and Mr. Smith followed him up, kept shooting at him, and it was very nearly directly in front of the tent when he turned around and shot at this other man.
Q. About how far did Smith follow Welch?
A. He followed him clear across the alleyway, anyway.
Q. That is, the streetway between the tents?
A. He was clear across there.
Q. After this shot that came from the south, that was the fifth shot fired—four shots fired by Smith at Welch and another one from the other way—and that made five shot; and then you say Smith fired another shot?
A. I think Smith fired two shots. I don't know just how many shots he did fire.
Q. He fired four at Welch?
A. I know he did.
Q. And you know he fired one at the other man?
A. I don't know anything about it, only that he stood there and snapped his gun, and of course these women were all around in there about me. I think he fired two shots at this other man down there.
Q. That makes six shots in all?
A. Yes, sir.
Q. How many shots were fired besides that one?
A. I didn't count them.
180 Q. You heard the one from the other side?
A. Yes, sir.
Q. That wasn't Smith's shot?
A. No, sir.
Q. And then did that other fellow fire again, or where did that shot come from?
A. I think not. I never heard any report. In fact, I don't know.
Q. You think Smith fired twice at this other person?
A. I think that he did, sir. I think that Smith fired six shots, and I really think that he shot six shots; and two of them that I say he fired down in this other direction, I could not say who he was shooting at, or anything about it.
Q. That makes seven shots there altogether?
A. That makes six that Smith fired.
Q. And then the other fellow fired one?

A. I don't know anything about that.
Q. You heard it?
A. Yes, sir; but I never saw him.
Q. You heard the shot?
A. Yes, sir.
Q. That makes seven shots that you heard fired?
A. Yes, sir.
Q. Did you hear anybody hollo to Smith or say anything to him?
A. I did not.
Q. How long did you remain in Muskogee after that time?
A. I remained there until Saturday, the last day of the fair.
Q. That occurred on Thursday?
A. I don't know what day it occurred on, what day of the week or what day of the month.
Q. Don't you keep up with the days of the week?
A. I did know until after the case was set here, the 13th of December, and I was subpœnaed on it, and after that I never paid any attention to it.
Q. Then you staid at Muskogee until Saturday?
A. Yes, sir.
181 Q. Then where did you go?
A. I came to Ft. Smith. I went to the river first.
Q. What did you come to this place for?
A. I came here to work.
Q. What sort of work?
A. I worked for Stansberry here in a restaurant; run it for him.
Q. How long did you stay here?
A. I staid here until the 5th day of January, and my wife and I went to Neodasaha.
Q. Where were you summoned as a witness?
A. I was summoned the first time at Ft. Smith, and the second time at Neodasha.
Q. Have you ever been arrested for anything?
A. No, sir.
Q. How old are you?
A. I am 22 years old.
Q. Have you a wife and children?
A. I have a wife and no children.
Q. What is your occupation?
A. Well, sir, I am selling stationary packages now. I have been railroading heretofore up until Feb. 28, 1893.
Q. What *rialroad*?
A. I broke on the 'Frisco.
Q. This branch of the 'Frisco?
A. From Neodasha to Burton.
(Witness excused.)

182 J. B. STANSBERRY, having been duly sworn upon behalf of the Government, was examined in chief by the assistant district attorney, Mr. J. B. McDonough, and testified as follows, to wit:

Question. You live here in Ft. Smith, I believe?
Answer. Yes, sir.

Q. Were you in Muskogee, or out there at the fair grounds, on the day of this killing, last September?

A. Yes, sir.

Q. Just tell us what you saw there on that day at that time.

A. Well, I had a hot fish and chicken stand at Muskogee at the fair, and when this killing taken place I was working at the lunch counter, and the first thing that attracted my attention was a shot fired up above me, and almost in a minute there was another one fired, and I think there was three fired right in succession, and I was looking up that way, and the crowd surged towards me, and I heard some one say that a man was killed, and I could see the smoke from the gun, but the crowd was so dense from where I was that I could not see the parties. I turned to the folks—there was a couple of ladies in the back of the tent—I turned to them and told them to get out and go to a house just back of the tent, I suppose about 30 steps, and when I looked back again there was a man on horseback had rode just beyond the tent towards where the shooting was, I suppose some 30 or 40 feet, somewhere along there; I could not tell the distance; it was a strange place to me, and I turned ag'in to see if my women folks had got out of the tent, and at the same time there was two shots fired almost at the same time. I turned back again and looked, and
183 whether the horse turned himself, or whether the man turned him or not, I don't know, but he turned back, and I could see then the blood gushing out of him, and he came right back within four feet of the tent, and there he fell off the horse right in front of me. He fell off the horse there, and some colored fellow went to try to raise him up, and about that time his wife came, and she fell down on him, and in the excitement which was so great it was hard to tell——

Q. At the time the man on horseback rode up did he say anything?

A. I could not say. There was so much confusion and noise that if he did I didn't hear it. Or if I did, I don't remember it now.

Q. Do you know whether he fired a shot or not?

A. I could not say that he did.

Q. You could not tell?

A. No, sir.

Q. But as I understood you a moment ago, your attention was directed away to something about your folks there?

A. Yes, sir.

Q. And while thus directed away you heard two shots almost at the same time?

A. Yes, sir; they were nearly together. That is my impression of it. My recollection is that they were near together; that is, they wasn't exactly together, but right near one to the other.

Q. And the next you saw of the man on horseback he was shot?

A. His horse had whirled around, and whether he had whirled it himself, or whether the horse had turned himself, I don't know, but he was coming back.

Q. Where was the blood gushing from?

A. Seemed to be up here somewhere; I could not tell exactly
184 Q. Did you know the man?

A. Not personally.

Q. Did you learn his name?

A. Yes, sir.
Q. Who was it?
A. Bob Marshal.
Q. You didn't see the first shot, then?
A. No, sir; I could not see the first sho'ting for the crowd of people. There must have been eight hundred or a thousand people all crowded up in a very small space there, and it was a hard matter to tell.

Cross-examination by Mr. THOMAS MARCUM:

Q. There was not eight hundred people at the fair ground, was there, the whole crowd?
A. This wasn't in the fair ground.
Q. There wasn't eight hundred people in town, was there?
A. I think there was.
Q. Outside of the citizens there?
A. I think there was eight hundred people, at least, if not more, in that ground.
Q. In that tent ground there?
A. Yes, sir.
Q. There couldn't eight hundred people stand in there at once, could there?
A. Yes, sir; I think so. I have been used to crowds all my life. I have been travelling a good deal, and being used to crowd, and that was my estimate of it. I didn't count them.
Q. What time was it?
A. Well, sir, I could not tell you exactly; I think about 10 or 11 o'clock in the day.
Q. Why do you say it was 10 or 11?
A. Well, I don't know; it was in the forenoon, I remember.
Q. Was there anything going on at the fair ground?
A. I think there was. I wasn't paying much attention to the fair ground.
185 Q. Where did this crowd of people come from?
A. Well, sir, I don't know. They came from the country, I suppose, and the town.
Q. Where did this crowd of people come from, to where this shooting was going on?
A. Oh, they had came in there during the morning.
Q. You had better crowds there, then they had in the fair grounds?
A. Yes, sir; we had better crowds there, then they had in the fair grounds.
Q. They were negroes, though, mostly?
A. No, sir; a great many white people.
Q. What white man had any business there?
A. Well, sir, I had business there. I was a white man. I was running a hit fish and chicken stand there.
Q. Where was that tent?
A. I was right by the side of the swing, or merry-go-around.
Q. You were in the extreme southern end of this little tent street?
A. I wasn't in the extreme sout'ern end of it.
Q. Wasn't your tent on that little mound there in the middle of the street, the southern part of it, the back end?

A. No, sir.

Q. Where was it, then?

A. It was between the gate and the merry-go-around.

Q. There is a dozen tents on each side between that and the gate. I want to know if there was any tent south of you?

A. Yes, sir; if that is south going from the tent down towards the merry-go-around.

186 Q. The street there runs east and west, and this street where the tent row was run north and south?

A. Then there was some still beyond the swing. I think there was a dance hall or something of the kind up on top of that mound.

Q. Up where?

A. Still further down on top of that mound, kind of raised place beyond the merry-go-around.

Q. Don't you know the merry-go-around was the other side of the mound, and that your tent was right on that mound?

A. My tent set at the back end; I don't know what length these lots are.

Q. South?

A. It was south from the gate, I reckon, if that is south.

Q. The merry-go-around was southwest of you, was it not?

A. It was still beyond me from the gate.

Q. We will call that south. There is nobody disputes that. How far southwest was it from you, the merry-go-around?

A. It come next to me.

Q. How far was it?

A. It was only just space enough for people to run between.

Q. Wasn't it 40 or 50 yards away from your place?

A. No, sir; my guy ropes and them was tied together in several places. My guy ropes was tied to the ropes of the merry-go-around in several places.

Q. You held up the merry-go-around with your tent, did you?

A. No, sir; not exactly; it kind of held my tent up.

Q. Then it was on the right side as you came in at the gate?

A. On the right hand side of the street as you came in from the gate.

Q. It was back of the west line of these tents, was it not?

187 A. We were all stationed right along on a line.

Q. Your tent was right in the middle of this street?

A. No, sir; right on one side, the same as the others.

Q. This merry-go-around was west of you?

A. No, sir; south. Fronted right up to that street.

Q. Right directly back of you?

A. No, sir; fronted right up to the street with me, the same as all th' tents on that side did. It was on a line.

(Witness is shown diagram.)

Q. I will ask you if your tent was not right up on this mound?

A. No, sir; it was right along here somewhere. I was right by the side of the merry-go-around. But this merry-go-aroun' here is set away back here, and it should front right up to this street.

Q. Will you swear there was no tent here in the middle of thi' street, right in front of this?

A. No, sir; not until you got clear past——

Q. Right in here?

A. That would be right in front of my fish stand. I will swear positively there was no tent in front of it. There was nothing in front here, except on this side, except this row of ten's out here. There was a tent out here, but it wasn't setting in the center, I don't think.

Q. You don't know who fired the first shot, do you?

A. No, sir; I could not swear who did it.

Q. You don't know who fired the second?

A. No, sir.

Q. Nor the third?

A. No, sir.

Q. They were fired in rapid succesession, were they not?

A. Yes, sir; there wasn't very much time between them. I
188 should judge about long enough for a man to cock his gun, and fire again.

Q. Just cock and shoot?

A. Yes, sir.

Q. At the firing of the third shot was there any space between that and the firing of the next?

A. Yes, sir; there was kin' of a stoppage; I could not say how long.

Q. About how long?

A. I could not say.

Q. There was a short space between?

A. Yes, sir; it wasn't a long time, because a man in that kind of a place could not tell accurately the length of time.

Q. Then there was more time between the third and fourth shots than there was between the first, second, and third?

A. Yes, sir; that is, I could not positively swear that there was only three shots fired the first time. It was the firing, though, when that firing began, and ceased up there.

Q. When the first firing ceased, then, there was a little space between that and the next shot, the commencement of the other shooting?

A. Yes, sir.

Q. Right there when the first firing ceased not only your attention was directed to these women——

A. Well, it was during that time, during the firing, that I told them first to get out of the tent.

Q. But you directed your attention to them again?

A. Yes, sir.

Q. At the end of the first firing?

A. That was about the time that the man on horseback rode up there.

Q. I say, you directed your attention to the women the second time at the end of the first firing?

A. No, sir; I don't think it was at the end of it. It was during the firing, or about the time that the first firing ceased that I first told
189 the women to get out of the tent and go into that house.

Q. That is just what I asked you a moment ago; that at the end of the first firing your attention was directed to these women?

A. Yes, sir.

Q. I asked you that half a dozen times.

A. No, sir.

Q. Where was it, then?

A. It was between the gate and the merry-go-around.

Q. There is a dozen tents on each side between that and the gate. I want to know if there was any tent south of you?

A. Yes, sir; if that is south going from the tent down towards the merry-go-around.

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Q. I say, you directed your attention to the women the second time at the end of the first firing?

A. No, sir; I don't think it was at the end of it. It was during the firing, or about the time that the first firing ceased that I first told
189 the women to get out of the tent and go into that house.

Q. That is just what I asked you a moment ago; that at the end of the first firing your attention was directed to these women?

A. Yes, sir.

Q. I asked you that half a dozen times.

A. I tried to answer it to you just as often as you asked it.

Q. Now, after that two other shots were fired together nearly?

A. Yes, sir.

Q. Might one man have fired these two shots?

A. Well, sir, I could not tell you. I hardly think he could.

Q. How close were they? You say they were nearly together. I want to know what you think about it.

A. Well, sir, I could not tell you. The supposition with me was that the shots were fired very rapidly; whether there was one man firing them both or two men I could not tell.

Q. Will you swear that one man could have fired them with one pistol?

A. No, sir; I would not swear it.

Q. Well, could he?

A. Well, sir, I don't know whether he could or not. A man with a self-cocking gun might fire two shots almost together.

Q. While you were directing your attention to these women after the first firing ceased, was there any other firing previous?

A. Well, that is what I say; at the time this man rode up there—at the time this man rode up there that I turned my attention to the ladies the second time.

Q. You don't know what occurred there?

A. I know there was two shots fired, and I looked back again and saw this man turning on his horse.

190 Q. That was the third?

A. No, sir; it wasn't the third.

Q. After the first fire, then, there was two other shots close together?

A. Yes, sir.

Q. And then you saw this man on the horse?

A. After these two shots were fired I saw the man there when he turned himself, or the horse turned; I saw him coming back.

Q. Will you state that there wasn't a shot fired before these two, now—I don't mean the first firing, but after the first three were fired, wasn't there another shot before these two that came together?

A. No, sir; I think not.

Q. Are you sure of that?

A. I am positive of it; yes, sir; as positive as a man could be under the circumstances. Of course I am not perfect on anything.

Q. Now, Mr. Stansberry, if that man was up there on horseback, a crowd of 800 people there—was there any other person hurt besides these two men?

A. I understood there was a man shot at the gate afterwards in the arm, and several people were run over and hurt a little, I don't suppose very badly or seriously.

Q. During that shooting the people were so thick—that tent row was not over fifteen feet wide, was it?

A. Yes, sir; it must have been between 20 and 30; there was room for two wagons to pass.

Q. Does it take fifteen feet for two wagons?

A. Yes, sir; almost. I would judge that, to the best of my knowledge.

Q. How wide was the whole lot?
A. I don't know.
Q. You never paid any attention to that?
A. No, sir.

191 Q. Who were these ladies your attention was directed to?
A. One of them was Mrs. Brooks, and the other was a lady that was working there for me.
Q. Who is Mrs. Brooks?
A. I don't know.
Q. Is that that colored woman that used to live here?
A. No, sir; she is a white woman.
Q. You don't know Mrs. Brooks, then?
A. Yes, sir; I was acquainted with her.
Q. What was Mrs. Brooks doing there?
A. I suppose she was setting in there talking to the woman that was working for me.
Q. What lady did you have there?
A. Mrs. Johnson.
Q. Who is Mrs. Johnson?
A. She is Mrs. Johnson is about all I know.
Q. Is she colored or white?
A. She is white.
Q. Where did you pick her up?
A. I didn't pick her up at all; I taken her from Ft. Smith up there.
Q. You carried her up there with you, did you?
A. Yes, sir.
Q. What did you do with her?
A. She was to work there, as I told you.
Q. What did you do with her when you got through there?
A. She came home.
Q. You brought her back, did you?
A. Yes, sir.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. How long have you lived here?
A. I have been living here 8 years in April.

192 Q. The women you speak of that were up there was simply working in your restaurant?
A. Yes, sir; she had been working around for two years.
Q. Your home has been here for eight years?
A. Yes, sir.
(Witness excused.)

193 WILEY MCINTOSH, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?
Answer. I live in Muskogee, Indian Territory.
Q. You are a citizen up there?
A. Yes, sir.
Q. What business are you in there?

A. I tried to answer it to you just as often as you asked it.

Q. Now, after that two other shots were fired together nearly?

A. Yes, sir.

Q. Might one man have fired these two shots?

A. Well, sir, I could not tell you. I hardly think he could.

Q. How close were they? You say they were nearly together. I want to know what you think about it.

A. Well, sir, I could not tell you. The supposition with me was that the shots were fired very rapidly; whether there was one man firing them both or two men I could not tell.

Q. Will you swear that one man could have fired them with one pistol?

A. No, sir; I would not swear it.

Q. Well, could he?

A. Well, sir, I don't know whether he could or not. A man with a self-cocking gun might fire two shots almost together.

Q. While you were directing your attention to these women after the first firing ceased, was there any other firing previous?

A. Well, that is what I say; at the time this man rode up there—at the time this man rode up there that I turned my attention to the ladies the second time.

Q. You don't know what occurred there?

A. I know there was two shots fired, and I looked back again and saw this man turning on his horse.

190 Q. That was the third?

A. No, sir; it wasn't the third.

Q. After the first fire, then, there was two other shots close together?

A. Yes, sir.

Q. And then you saw this man on the horse?

A. After these two shots were fired I saw the man there when he turned himself, or the horse turned; I saw him coming back.

Q. Will you state that there wasn't a shot fired before these two, now—I don't mean the first firing, but after the first three were fired, wasn't there another shot before these two that came together?

A. No, sir; I think not.

Q. Are you sure of that?

A. I am positive of it; yes, sir; as positive as a man could be under the circumstances. Of course I am not perfect on anything.

Q. Now, Mr. Stansberry, if that man was up there on horseback, a crowd of 800 people there—was there any other person hurt besides these two men?

A. I understood there was a man shot at the gate afterwards in the arm, and several people were run over and hurt a little, I don't suppose very badly or seriously.

Q. During that shooting the people were so thick—that tent row was not over fifteen feet wide, was it?

A. Yes, sir; it must have been between 20 and 30; there was room for two wagons to pass.

Q. Does it take fifteen feet for two wagons?

A. Yes, sir; almost. I would judge that, to the best of my knowledge.

Q. How wide was the whole lot?
A. I don't know.
Q. You never paid any attention to that?
A. No, sir.
191 Q. Who were these ladies your attention was directed to?
A. One of them was Mrs. Brooks, and the other was a lady that was working there for me.
Q. Who is Mrs. Brooks?
A. I don't know.
Q. Is that that colored woman that used to live here?
A. No, sir; she is a white woman.
Q. You don't know Mrs. Brooks, then?
A. Yes, sir; I was acquainted with her.
Q. What was Mrs. Brooks doing there?
A. I suppose she was setting in there talking to the woman that was working for me.
Q. What lady did you have there?
A. Mrs. Johnson.
Q. Who is Mrs. Johnson?
A. She is Mrs. Johnson is about all I know.
Q. Is she colored or white?
A. She is white.
Q. Where did you pick her up?
A. I didn't pick her up at all; I taken her from Ft. Smith up there.
Q. You carried her up there with you, did you?
A. Yes, sir.
Q. What did you do with her?
A. She was to work there, as I told you.
Q. What did you do with her when you got through there?
A. She came home.
Q. You brought her back, did you?
A. Yes, sir.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. How long have you lived here?
A. I have been living here 8 years in April.
192 Q. The women you speak of that were up there was simply working in your restaurant?
A. Yes, sir; she had been working around for two years.
Q. Your home has been here for eight years?
A. Yes, sir.
(Witness excused.)

193 WILEY MCINTOSH, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?
Answer. I live in Muskogee, Indian Territory.
Q. You are a citizen up there?
A. Yes, sir.
Q. What business are you in there?

A. United States Indian policeman.
Q. Did you know Robert Marshal?
A. Yes, sir; I did.
Q. How long did you know him?
A. About ten years, I guess.
Q. Do you know whether or not he acted as United States Indian policeman there?
A. Yes, sir; he was.
Q. How long?
A. He has been there about ten years or more in that business.
Q. Were you out at the fair ground where he was killed, where he and Welch were killed?
A. Yes, sir; I was there.
Q. Tel' us all you know about that difficulty in your own way.
A. Well, in the first place, I heard the shooting over on the outside of the fair ground—there is a place there on the outside owned by Jim Likem. There was quite a number of people there. I heard some five or six shots. The last shot I heard I run over there to see what was the trouble, and when I got there Robert Marshal was killed, and the people seemed to be very much excited. Presently after I got there where the killing was done at I run right straight to the gate, run right outside the gate——

Q. Were you horseback or on foot?

194 A. I was on foot. As I turned the corner of the gate I met Charles Smith, the defendant, and when I saw him there he had his pistol in his hand, and so I had mine in my hand. And he snapped his pistol on me three times, and I snapped mine on him five times. It failed to shoot. Presently I run back to the gate——
Q. What was said by he or you to each other?
A. Nothing at all.
Q. He knew you?
A. Yes, sir.
Q. And knew you were an officer?
A. Yes, sir.
Q. Neither your pistol or his fired?
A. No, sir. Then I run back to the gate and got another pistol and came back where I saw him, and by that time he was gone.
Q. Were you present when he was captured?
A. No, sir; I was not present.
Q. Did you see Marshal at the time he was killed?
A. I saw him as he was falling off his horse.
Q. Did you see him at the time the shot was fired?
A. No, sir.

Cross-examination by Mr. C. J. FREDERICK:

Q. Robert Marshal was a citizen of the Creek Nation, was he not?
A. Yes, sir.
Q. You are a citizen of the Creek Nation?
A. Yes, sir.
Q. John Welch was also a citizen of one of the Indian tribes, was he not? Was he a citizen of the Creek Nation?

A. I could not say; I think not.
195 Q. His wife is a citizen, is she not?
A. Yes, sir.
Q. He was a Cherokee citizen, wasn't he?
A. I could not say that.
Q. What is Charley Smith, the defendant? He is a citizen of the Cherokee Nation, is he not?
A. Yes, sir; he is called a citizen; I guess he is.
Q. You are an Indian policeman?
A. Yes, sir.
Q. What was Robert Marshal?
A. He was an Indian policeman.
Q. Had you seen Robert that morning?
A. Yes, sir.
The COURT. Was Robert Marshal an Indian policeman at the time he was killed?
The WITNESS. Yes, sir.
The COURT. A deputy marshal, also?
The WITNESS. I don't know, sir, whether he was a deputy or not. I know he was an Indian policeman.
Mr. C. J. FREDERICK (of counsel for defendant). Was Robert sober that morning?
A. He was.
Q. Did you see him the night before?
A. No, sir; I did not.
Q. You don't know whether he had been drinking any or not?
A. No, sir.
Q. You were not with him, I reckon, very close?
A. No, sir.
Q. What was he doing on his horse? Do you know why he was riding around through the tents on his horse?
A. No, sir; I do not.
Q. It wasn't required of Indian policeman to ride around on his horse through the tents, was it?
A. He was there as a guard, and it was his business to keep down peace if he could.
Q. To keep down peace?
A. Yes, sir.
Q. How many thousand people were there in that tent row?
A. I don't know; there was quite a number there.
196 Q. Not several thousand, were there?
A. No, sir; about four or five hundred, I reckon; maybe more.
Q. Mostly all colored people, I reckon?
A. Well, they were mixed; colored and Indians.
Q. In that lot, in that tent row, there wasn't so many people in that row, was there?
A. Yes, sir; there was a good many.
Q. Most all colored people, were they not?
A. They were mixed; colored, Indian, and darkies.
Q. How many people were in that tent business do you think?

A. I could not say how many. There wasn't less than four or five hundred in there. There was quite a number there.

Q. There were more there than there were over in the fair grounds, was there not?

A. I guess not.

Q. Did you speak to Charley when you met him there, when he had his pistol and snapped it at you?

A. I didn't say a word to him.

Q. You said nothing to him and he said nothing to you?

A. No, sir.

Q. Your pistol wasn't loaded, was it?

A. Yes, sir; my pistol was loaded all around. It had five loads in it. I carried that many in it.

Q. It wouldn't shoot at all?

A. No, sir; that is the first time it ever failed. I never would carry a pistol that would not shoot, but that is a time it would not fire at all.

Q. Was Charley running while he was snapping at you?

A. He run afterwards—after he snapped three times.

Q. He snapped and then run?

A. Yes, sir.

Q. Did you see Scot Gentry that day after that?

197 A. No, sir; I did not.

Q. You know Scott?

A. Yes, sir.

Q. He is an Indian policeman, is he not?

A. Yes, sir.

Q. He was there that day?

A. I guess so; I didn't see him, though.

Q. Did you see K. B. Brown there that day at that time when you were snapping the pistol at him? Did Cookey Brown see Charlie Smith snapping his pistol at you, and you at him?

A. I do not know whether he did or not.

Q. You know him, don't you?

A. Yes, sir.

Q. Did you see him at all there, there about the big gate?

A. I didn't see him there at all.

Q. Were there many people there at the time Charley was snapping there?

A. There was a good many there.

Q. That was at the front gate wasn't it, that Charley was snapping at you?

A. It wasn't exactly in the front gate. It was below the front gate. It was right back of the tent there.

Q. Was Robert Marshal any relation of yours?

A. None at all.

Q. What was Charley doing when you first came up and you saw him with a pistol in his hand?

A. He just had his pistol in his hands.

Q. Standing?

A. Yes, sir; he was on the back part of that tent there with his pistol in his hands. It seemed like he wanted to get out.

Q. How close were you to him?
A. I was about as close as from here to you.
Q. You didn't say a word to him, or he nothing to you?
A. No, sir.
(Witness excused.)

198 HENRY DEWITT, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?
Answer. Muskogee.
Q. Were you at Muskogee out there about the fair grounds in September, when this killing occurred?
A. Yes, sir.
Q. Did you see the defendant, Charley Smith?
A. I seen him out there during the day.
Q. Did you see the shooting? Did you see Smith after the shooting was over?
A. Yes, sir.
Q. Where did you see him?
A. I saw him running away over towards the fair ground fence.
Q. He was running, was he?
A. Yes, sir.
Q. Did he have a pistol?
A. Yes, sir.
Q. What did he do with the pistol?
A. He dropped it there somewheres close to the fence, laid it down, or something.
Q. Did you go to the pistol?
A. No, sir.
Q. Did you see the pistol?
A. Yes, sir.
Q. How long before you saw it?
A. It was about 20 minutes that I saw Bud Kell and Sam McCurtain have it. They had it in their hands throwing the shells out of it.
Q. Did it have any load in it?
A. No, sir; all empty shells.
Q. You saw them throwing the shells out, did you?
A. Yes, sir.

199 Cross-examination by Mr. C. J. FREDERICK:

Q. Saw who throw the shells out?
A. Sam McCurtain.
Q. Were you with them when they found it?
A. No, sir; I was right on the inside of the fence. I came around and met them at the gate.
The ASSISTANT DISTRICT ATTORNEY. I had a subpœna out for McCurtain, but I got the wrong name and never got him.
Mr. C. J. FREDERICK (of counsel for defendant). You saw Sam McCurtain throw the shells out of the pistol?
A. Yes, sir.

Q. What pistol did you see him throw the shells out of?
A. A white-handled pistol, 45.
Q. You don't know where he got it, do you?
A. Yes, sir; laying down by the side of the fence.
Q. How do you know?
A. I saw him when he stooped down; I did not see what he picked up. He said he got the pistol.
Q. You just know what he told you. All empty hulls?
A. Yes, sir.
Q. Didn't he get one loaded cartridge out of it?
A. No, sir.
Q. Did you see the defendant snap it at anybody?
A. No, sir.
Q. Was it on the inside of that lot where the tents were that you saw him drop the pistol?
A. Yes, sir; right along the side of the fair ground fence on the outside where the shooting was done; on the west side.
Q. How far from the corner?
A. Oh, it was about 20 or 30 steps, I reckon.
200 Q. Where were you standing when you saw that?
A. I was standing on the inside of the fair ground.
Q. On the inside?
A. Yes, sir.
Q. And you could see over the fair ground fence, and see them do that?
A. Yes, sir; saw through it; it is just a wire fence.
Q. Isn't the fair ground enclosed in a plank fence?
A. No, sir; not back towards the stables.
Q. You could go to the wire fence and look over?
A. Yes, sir; look through.
Q. How far were you from him when you saw him drop the pistol?
A. I don't know how far it was.
Q. As far as from here to the United States jail over here?
A. No, sir; I expect it was about 25 or 30 steps, maybe a little further; but I don't know.
Q. You were on the inside of the fair ground?
A. Yes, sir.
Q. You were on the inside and he was on the outside?
A. No, sir; I wasn't on the outside of the lot where he was. I went around in the fair ground.
Q. You say you saw him back of somebody's tent?
A. No, sir.
Q. He was on the outside over next to the Herril Institute, was he?
A. Yes, sir; he was on the outside, and I was on the outside at the merry-go-around. I saw him standing by the fence, and I went around to him inside the fair ground.
Q. Were you on the inside of the fair ground when you saw him drop the pistol?
A. No, sir; I didn't see him drop it; but I told them I thought he dropped it there.
Q. You didn't see him drop it there at all?
A. No, sir.

Q. That is where I misunderstood you. You didn't see him drop the pistol?

A. No, sir.

201 Q. Did you see Wiley McIntosh?

A. Yes, sir; I saw him standing at the gate after the shooting was over.

Q. At what gate was it you saw him?

A. On the outside of the fair ground, out a little by the gate there.

Q. Is that one of the front gates up on that street?

A. Yes, sir; about 15 or 20 steps from the corner gate.

Q. Corner gate of the fair ground?

A. Yes, sir; down towards town.

Q. You say you didn't see him drop the pistol, then?

A. No, sir.

Q. You didn't see him with the pistol at all, did you?

A. No, sir.

Q. You didn't see Charley Smith with any pistol?

A. No, sir.

A JUROR. Was Charley Smith trying to get a horse?

A. Yes, sir.

Q. Was it his horse?

A. No, sir.

Mr. C. J. FREDERICK (of counsel for defendant). Whose horse was he trying to get?

A. I could not say for certain whose horse it was.

Q. How was he trying to get the horse?

A. The way I looked at it I could not say, but it looked like he was trying to untie the horse.

Q. How long did he stay there fooling with the horse?

A. He didn't stay there very long when I saw him. I don't know how long he had been there.

Q. You saw him close to the horse, and then you saw him going off?

A. Yes, sir.

202 Q. You don't know whether he was trying to get the horse then or not?

A. No, sir; but I thought he was.

Q. You thought about that like you did about the pistol; you thought he had a pistol, and you didn't see the pistol, and you thought he was trying to get a horse, though you didn't see it?

A. No, sir; he didn't get it.

(Witness excused.)

Here court adjourned until Monday morning, Feb. 18, 1895.

203 MONDAY MORNING, *Feb. 18th, A. D.* 1895.

GEORGE TURNER, having been duly sworn upon behalf of the Government, was examined in chief by the assistant district attorney, Mr. J. B. McDonough, and testified as follows, to wit:

Question. Where do you live?

Answer. Muskogee.

Q. Did you know John Welch in his life time?

A. Yes, sir.

Q. Did you know Robert Marshal?

A. Yes, sir.

Q. Tell what you saw of the killing of these two men.

A. Well, during the fair I had a stand at the fair—that is, a boarding table, and the morning of the killing, on the 27th, I was standing inside of my camp and I heard a pistol shot, and I stepped out, and when I stepped out I saw Charles Smith walking right along behind John Welch shooting at him, and he remarks "Do you take it up, and just walked right along behind him shooting him, and he made two shots, and after shooting him twice he turned, that is, towards a came he had there.

Q. Who turned?

A. Charley Smith did after he got through shooting at John Welch, and about that time Robert Marshal rode up and says, "Halt there; what are you doing? What are you shooting that man for?" and at the same time Robert Marshal pulled out his pistol and throwed it at Charley Smith and shot at him, and Charley he looked around, and as he looked around he came around just that way, with his pistol in both hands, and shot at Robert, and at the report of his pistol Robert Marshal went right off backwards, and Charley run then and I didn't see him any more. He run into his camp and I didn't see him any more.

204 Cross-examination by Mr. THOMAS MARCUM:

Q. Where was your stand?

A. My stand was the third stand from Tackey Grayson's, where they said that Charley went to get the pistol.

Q. You don't know where he got his pistol, do you?

A. I don't know where he got it, but I was told that he got it there from Scott——

Q. I am not asking you what you heard.

A. I don't know myself where he got the pistol. I don't know whether it was his pistol or somebody else's pistol.

Q. What are you talking about the pistol for? I didn't ask you anything about the pistol. I asked you where your stand was.

A. My stand was the third stand from Tackey Grayson's, on the same side where they said he went and got the pistol.

Q. The third in what direction?

A. My stand was north of Tackey Grayson's, the second stand as you go into the gate.

Q. The second one?

A. Yes, sir; the stands are rowed off north and south.

Q. Who was the first stand on the west as you go into the gate?

A. Well, I don't know the man's name. It was a white man. He was running a candy stand and baked pies.

Q. You were in the third tent as you go into the gate?

A. I was the second one as you go into the gate, on the right hand side as you go into the gate.

Q. In the second?

A. Yes, sir; on the right hand side as you go into the gate.

205 Q. How far was that from the gate?

A. Well, I suppose it was about where the line was; they gave us 20 feet fronts—that is, at first. I had a 16 feet front. You can judge how far it was.

Q. Your tent began after the first 20 feet?

A. Yes, sir.

Q. Was your tent connected with the other tents?

A. William James and John Welch's, in partnership, was right next to mine.

Q. I asked if yours was connected with the first tent on the line?

A. No; I had my line posts there and he had his.

Q. Will you answer my question?

A. I will answer it, provided it was like it was.

Q. Was your tent connected with this first tent on the right?

A. My tent was connected with no tent. I had my own separate tent.

Q. How far was your tent from the first tent?

A. His'n was 20 feet, and the line of mine started right where his began.

Q. Then they were together?

A. No, they were not together, because there was a line of posts set there. I started right from his posts. I could not tell whether mine was two inches from his or three inches.

Q. I wasn't thinking about an inch or two. You were inside of your tent?

A. I was standing just inside of the door when I heard the first pistol shot, and I stepped out.

Q. Now, just wait a moment, please. You were standing inside of your door. Where?

A. At my camp.

Q. What time of day was it?

A. It was between 11 and 12, I suppose, as near as I can guess at it. I didn't have any timepiece.

Q. What were you doing there in your tent?

206 A. I was running a boarding table. Boarding people there.

Q. Was the door of your tent about the center?

A. No, it wasn't. On the south side of my tent—that is, the south front—there was about six feet space taken by another stand.

Q. That was on the south side on the front?

A. Yes, sir; a jewelry stand. Six feet taken off for that, and the other part was left open for a passageway.

Q. Then there was about fourteen feet of your tent that was open on the right of this jewelry stand?

A. No, sir; there could not have been 14 feet; I only had 16 feet front.

Q. You state that the jewelry stand was on the south end of your tent?

A. On the south side of the front. On the south end of the front.

Q. Then the opening to your tent was on the north side?

A. That is it.

Q. Where were you from the jewelry counter?

A. I was standing—I could not tell you exactly whether I was three feet or four feet or five feet, but I was inside, just inside of the line, and I heard the pistol shot, and I didn't see——

Q. If you were just inside the line how could you be five feet from it?

A. I said that I didn't know whether I was four, five, or three. I didn't measure the distance at all, but I am confident I was inside.

Q. I am not questioning you were inside at all.
A. You asked me if I was inside.
Q. I know I did, and I am asking you how far inside you were?
A. I told you I could not tell whether I was two feet, three feet, or four feet.
207 Q. What then?
A. And I heard the shooting, and when I heard the shooting I stepped out.
Q. You have told about that three or four times. Will you please wait a moment. You don't know whether you were two, three, four, or five or six feet inside?
A. No, sir.
Q. You have no idea about the distance?
A. No, sir; I don't have any idea, because I didn't take a thought.
Q. What were you doing standing there?
A. I wasn't doing anything in particular.
Q. How were you standing when the shot was fired?
A. I don't know how I was standing, whether my back was nearly east or west.
Q. What were you thinking about?
A. I don't know what I was thinking about, because when the shooting commenced that took all the thoughts away, I expect.
Q. You were just standing there looking in some direction, and you don't know where. You don't know what distance you were from the front; you don't know what you were doing, and you do not know what you were thinking about?
A. No, sir; whether I was talking to my wife and children, or what I was doing.
Q. Did you have any children?
A. Yes, sir; I am supposed to be the father of three.
Q. Were your children there?
A. Yes, sir.
Q. Where?
A. Inside of the tent.
Q. Where?
A. And they were in the back part of the tent. I don't know what part of the tent they were exactly, but they were in the back part of the tent.
Q. Why don't you know where they were?
A. Well, I didn't know it was necessary that I should come and say where they were standing at.
208 Q. How do you know they were in there?
A. When the shooting commenced my wife and children and several other parties in there started out to see, and I pushed them back. I says, "Don't come out here."
Q. Did they go out before you did?
A. They didn't go out, because I made them go back.
Q. How long did it take you to make them go back?
A. I didn't have any watch.
Q. Were you sometime keeping them back?

A. No, sir; I says, "Don' go out there; it is safer for you to stay in here than to go out."

Q. Is that all you said?

A. I don't know whether that is all or not.

Q. After that what did you do?

A. I stood outside there and looked and saw the proceedings of that shooting.

Q. You had to go outside, didn't you?

A. I was on the outside when I told them to step back.

Q. One shot was fired before you got out?

A. Yes, sir.

Q. How long after you got out before your wife and children came out?

A. I didn't take any minute of it.

Q. Did they come out immediat/ey?

A. I don't know whether they came out immediately or whether they came out in two minutes, or five minutes, or ten minutes, but I know the shooting was all done in 15 minutes. It wasn't that long before the whole thing was over.

Q. It took about 10 minutes for Charley to walk along behind after John, didn't it?

A. I don't know how long it took him.

Q. You think it took about 10 minutes?

A. No, sir; I don't think nothing about it.

209 Q. What did you say in fifteen minutes for?

A. I said in that time the excitement was all over of the shooting.

Q. You said awhile ago the shooting was all over in 15 minutes, and now you say the excitement. Which was it?

A. The shooting.

Q. About how many minutes did it take Charley to make a shot?

A. I don't know nothing about that.

Q. How many shots did Marshal fire?

A. Two shots.

Q. Marshal fired the first shot at Charley?

A. Yes, sir; he halted Charley and then shot.

Q. He was on his horse, wasn't he?

A. Yes, sir.

Q. Did you see the ball when it struck the man?

A. No, sir.

Q. Bob Marshal, when he was shooting at Charley, was shooting right towards you, was he not?

A. No, sir.

Q. Wasn't Marshal south of Smith when he was shooting at him?

A. Yes, sir.

Q. Wasn't you north of Welch?

A. Yes, sir; kind of northwest of Welch.

(Witness is shown diagram.)

Q. How near was Marshal to Smith's tent here?

A. I suppose he was in about 20 or 30 steps.

Q. Where was Smith?

A. I could not say exactly where Smith was, but he was kind of quartering across. He was quartering from Marshal.

Q. With reference to Marshal, where was Smith's amop?
A. Over here.
Q. That is, on the east side?
A. Yes, sir.
Q. Who was the first tent to Marshal on that side of the street?
A. I don't know; there was some white people camped in there.
210 Q. Where was Tackey Brayson, with reference to Marshal?
A. I don't know exactly, but he was still below Tackey's camp.
Q. South?
A. Yes, sir.
Q. Where was Smith, with reference to Tackey's tent?
A. He was south, quartering.
Q. How far south?
A. I don't know.
Q. Wasn't this whole side of the street on the east next to the fair ground covered with tents, the whole of it?
A. I don't know whether the whole of it was or not.
Q. Charley Smith was shooting directly over there into these other tents?
A. No, sir; he was walking right along behind John Welch shooting at him.
Q. Did he not shoot in the direction of the tents?
A. He was shooting in the direction of some of the tents; he wasn't shooting in the direction of all of them.
Q. I will ask you if Marshal, when he fired the two shots, if he was where he was, and Smith and Welch were on the east side of that street, if he also wasn't shooting in the direction of these tents over there on the east side?
A. He wasn't shooting in the direction of all of them; he could not have done that?
Q. I don't mean all of them, but some of them?
A. He was shooting in the direction of that way, but what tent he was shooting in the direction of I could not say.
Q. He would have been bound to hit some of these tents unless he hit Welch, wouldn't he?
A. It would depend on how he was shooting.
Q. You have stated which way he was shooting.
A. Yes, sir; I said he was shooting kind of northeast direction; quartering.
211 Q. Wasn't he bound to hit some of these tents unless the ball was otherwise stopped?
A. I don't know whether he would or not.
Q. Did you ever hear of any ball hitting any tent there?
A. No, sir; I didn't.
Q. How long was it after Marshal shot the first shot at Smith until he fired the second?
A. I told you I didn't have any time timepiece, and I could not tell how long, but the moment that Robert shot at Charley he whirled. Robert had halted him, and he didn't stop. Charley had made one or two leaps to run. The moment Robert shot at him he whirled around with his pistol and shot immediately, and at the crack of his pistol Marshal went off from his horse.

Q. Who fired first, Marshal or Smith, at Marshal's second shot?
A. Marshal fired first.
Q. Marshal fired two shots at Smith before Smith shot?
A. Marshal fired the first shot; after he halted him he fired.
Q. And then fired another?
The ASSISTANT DISTRICT ATTORNEY. He didn't say that.
The WITNESS. The second shot, I could not tell which one fired first.
Mr. MARCUM (of counsel for defendant). They were right close together, the last shot of Marshal and Smith's shot?
A. I don't know how close together they were; they were close enough to distinguish that there was two shots made.
Q. Is that about all the space there was between them?
A. I suppose so.
212 Q. When you got out of your tent what was Welch doing?
A. He was walking along going quartering across there, and Smith was behind him just firing it into him. He didn't say anything.
Q. How many shots did Smith fire after you got out of your tent?
A. Three shots.
Q. How many at Welch after you got out?
A. He fired two at Welch, as near as I can remember; two at Welch and one at Marshal.
Q. How far was Welch from Smith when he fired the second shot, or the first shot, I mean, after you got out?
A. I could not tell you exactly the distance, but he wasn't more than four or five feet from him.
Q. How far was Welch from Smith when Smith fired the third shot at him; that is, the second shot you saw?
A. Smith never did stop, nor did Welch. Smith was walking along behind him shooting.
Q. How far was Smith from Welch when Welch was shot at the second time as you saw?
A. I told you in about four or five feet from him.
Q. Both times?
A. I don't know how far he was the second shot, but when I came out he was in four or five feet, and he never did stop; he just kept walking right along behind him, asking him if he took that up. John never said a word. Every time he shot him he would draw up, and the blood was gushing out of his mouth.
Q. Was Welch walking pretty fast or pretty slow?
A. He was walking tolerable slow.
Q. Smith about the same way?
A. He was walking fast enough to shoot him.
213 Q. Which was walking the faster?
A. I could not tell.
Q. Then you only saw Smith shoot at Welch twice?
A. That is all I saw fired.
Q. Did you see any other people there?
A. I guess there was other people there.
Q. Who did you see?
A. I didn't take any notice.
Q. Didn't you see a lot of women standing there?

A. There was other people standing there; I don't know who all was there.

Q. Who did you see there?

A. I saw Jim Smith there, for one.

Q. Where was Jim?

A. He was right about where that Thack was.

Q. Who else did you see?

A. There was a white man right adjoining tent to me, right the first tent from the gate.

Q. Who was he?

A. I don't know who he was.

Q. Did you see any women that you recollect of at that time?

A. I wouldn't be certain whether I seen any or not, because I wasn't interested in the women just at that time.

Q. Have you ever been convicted of anything?

A. No, sir.

Q. Do you remember of me coming over there right after dinner and asking about where this took place, and all about it, and everybody said they didn't know?

A. No, sir; I wasn't interested in you.

Q. You knew me, didn't you?

A. Yes, sir. I don't remember of seeing you there that day.

Q. How far was Bob Marshal from the merry-go-around when he shot Smith?

A. I didn't measure the distance.

Q. What direction was the merry-go-around from where Marshal
214 was?

A. The merry-go-around was south.

Q. Directly south?

A. I think it was mostly kind of southwest.

Q. Wasn't it towards the peach orchard from Marshal?

A. Peach orchard?

Q. Yes.

A. What peach orchard?

Q. Don't you know where the peach orchard is?

A. You may; I don't.

Q. Right down there by Jim Lighdon's?

A. Susannah Lighdon's? She might have peach trees there, but I didn't know it was called a peach orchard.

Q. Don't you know that everybody calls it a peach orchard?

A. No, sir; and I knew of it before you did.

Q. I will ask you if the merry-go-around wasn't rather between that peach orchard and Bob Marshal, or those peach trees there?

A. I think it is kind of southwest where Susannah lived from the merry-go-around.

Q. The merry-go-around, then, is between that and where Bob Marshal was, isn't it?

A. Yes, sir; I suppose so; it is kind of between there.

Q. Did you see anybody at John Welch's tent when this shooting was going on?

A. I wasn't interested in the people there. I was looking at the shooting.

Q. Did you see any white man about there?

A. No, sir; I was looking at the shooting. Of course, there was lots of white men and lots of colored men and Indians and all other denominations, but I was looking at the shooting when it was going on.

Q. I will ask you if you knew John Welch?

A. Yes, sir.

215 Q. How old was he?

A. I don't know. He was a married man and a father of one child.

Q. How large a man was he?

A. I guess he was a man that weighed about 180 or 185 pounds.

Q. Do you know anything about his strength?

A. No, sir.

Q. Was he a weakly or a strong man?

A. I never did try his strength.

Q. How long have you been living in Muskogee?

A. Something over a year, but I have been working close to Muskogee about 19 years.

Q. From the appearance of Mr. Welch what do you say as to his strength?

A. I would take him to be a stout man, but whether he was stout or not I don't know. I never tried his strength.

A JUROR. Did you see Marshal, the man on horseback?

A. Yes, sir.

Q. Who fired the first shot?

A. Marshal did.

Q. How did he have his pistol?

A. He had his pistol in his right hand.

The ASSISTANT DISTRICT ATTORNEY. Before he fired he halted Smith?

A. Yes, sir.

Mr. C. J. FREDERICK (of counsel for defendant). He had the pistol pointed towards Smith, didn't he, when he fired?

A. He had it pointed in this direction [indicating].

The ASSISTANT DISTRICT ATTORNEY. It was in that direction, but above him?

A. Yes, sir; it was in that direction, but whether it was pointed at him or above him I could not say.

Q. What is your best judgment about that.

A. I could not say; but as he came over that way with his pis-

216 tol, his horse made a dash with him, and I could not tell whether he shot near Smith or above him, or below him.

(Witness excused.)

217 *Commission of Marshal introduced in evidence.*

The ASSISTANT DISTRICT ATTORNEY. I desire to offer in evidence the commissions of Robert Marshal as United States Indian policeman.

The COURT. Yes.

Mr. C. J. FREDERICK (of counsel for defendant). You can consider them read.

The COURT. Is that a commission as deputy?

The ASSISTANT DISTRICT ATTORNEY. Commission as United States Indian police from the Indian agent, Leo Bennett, dated July 1st, 1893, this one, and they run back for four or five years prior to that time. I have them all here.

218 WILLIAM NEWSOME, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Are you an officer?

Answer. Yes, sir.

Q. What officer?

A. Deputy marshal.

Q. Where do you live?

A. Muskogee.

Q. Were you at Muskogee on the day of the killing of Welch and Marshal?

A. Yes, sir.

Q. Did you see Smith, the defendant, there?

A. Yes, sir.

Q. Did you arrest him?

A. Yes, sir.

Q. Just state where you found him, and how you found him.

A. I found him in a building of Sam Spencer's premises, in the town of Muskogee, a room cut off from a coal house, a small bedroom.

Q. Was the door fastened? Just tell how you arrested him, and what he said, and what you said.

A. Yes, sir; I was down town at the time he was doing the shooting, and he was located right along the street; and I met a colored gentleman, I don't know his name now—at any rate they said they wanted me at Spencer's. I went up there, and there was several men in the yard, and they said Charley Smith was there in the coal house or barn, and I says, "We will go on, and we will go and search the barn;" and Mr. Adams says, "He is not in there, I think he is in the house here." I says,

"Well, I will see," and I walked up and called on him, tried to
219 open the door, and it would not open, and I called to him. I says, "Charley, if you are in here come out and give up, and I will protect you so you are not hurt," and he would not answer, and I turned to Dave James and I said, "If you will knock this door in I will go in," and so Dave picked up an ax and struck it, and the second lick it opened, and I went in there, and he was sitting on the left hand said' as I went in. I throwed my pistol down on him and told him to get up, and he got up and I searched him.

Q. Did he have any pistol on?

A. No, sir.

Cross-examination by Mr. THOMAS MARCUM:

Q. How long was that after the kill'ng?

A. It was two hours, I will say; I am n't positive.

Q. How far is Mr. Spencer's from the court-house?

A. About 200 yards.

Q. The back part of the court-house?

A. No; not from the back part.

Q. Is it 20 yards?

A. Yes, sir; from the west corner of the court-house to the coal house where Charley Smith was arrested was about 100 yards, according to my judgment. I never measured it, but that would be my judgment about it.

Q. This coal house is almost—of course you could not tell exactly—but this coal house is right between the U. S. jail and the court-house, is it not, about?

A. On a line it would be mighty near between.

Q. And the white Baptist church is near Spencer's, is it not, and
220 the colored Baptist church is just across the street from the other church?

A. Yes, sir.

Q. The colored Baptist church is right up the same street that Spencer lives on, is it not?

A. Yes, sir.

Q. On the next corner, is it not?

A. Yes, sir; just across the street.

Q. And the other Baptist church is across the street?

A. It would be south of that first.

Q. Charley lived with Spencer, didn't he; worked for him there a good deal?

A. I don't know as to his living with him. I noticed him around there some.

Q. Don't you know he was working for him?

A. I have seen him at different times with Mr. Spencer's horse and buggy.

Q. Mr. Spencer is a white man and clerks in Turner's store?

A. Yes, sir; he is a white man, but as to his citizenship I don't know.

Q. Mr. Spencer keeps a boarding house, don't he?

A. Yes, sir.

Q. And the clerks from the various stores generally board with him, don't they?

A. There is a good many that board with him, but as to just who I don't know.

Q. It is a public place?

A. Yes, sir; it is a boarding house.

(Witness excused.)

221 The ASSISTANT DISTRICT ATTORNEY. There are two or three witnesses, one of them not here, but I think they will properly come in rebuttal, and I will not call them at this time.

Mr. C. J. FREDERICK (of counsel for defendant). We want to ask Ella London some questions that we omitted before, before you close.

ELLA LONDON, recalled by defense for further cross-examination, testified as follows, to wit:

By Mr. THOMAS MARCUM:

Q. Did I understand you to say the other day that you lived at your father's house?

A. Yes, sir; I do now. I didn't when me and my husband first parted.
Q. Did you and another woman live together there—Bell Johnson?
A. No, sir; I never did stay at Mrs. Johnson's.
Q. Below there?
A. No, sir; I did not. Me and my husband used to live below there.
Q. After your husband died who did you live with there?
A. I staid there awhile, and then I moved to mama's.
Q. Who did you stay there with?
A. Me and another girl and my brother.
Q. What were you doing there?
A. I didn't go to my mama's because her house wasn't large enough to keep me there.
Q. What kind of a house were you keeping?
A. I was keeping a good house. I wasn't keeping any sporting house.
Q. Were you at the Ft. Gibson payment?
A. Yes, sir.
Q. And the Saline payment?
A. No, sir.
Q. Tahlequah?
A. No, sir; I was only at Ft. Gibson payment.
222 Q. Were you at Muldrow?
A. No, sir.
Q. Sequoyah?
A. No, sir.
Q. How long 'id you stay at the Ft. Gibson payment?
A. I staid there four days.
Q. What were you doing there?
A. I went to the payment to see the payment, because that was the first one I ever seen.
Q. You were arrested there, wasn't you?
A. I never was arrested in my life.
Q. Didn't Bob Clark arrest you there?
A. No, sir.
Q. You staid in Kansas awhile, didn't you?
A. Yes, sir; me and my husband lived together in Kansas.
Q. Didn't you keep a sporting house in Parsons?
A. No, sir; my husband worked on the railroad.
Q. I will ask you if you were not at the Muldrow payment over here, and if you didn't try to get money from Charley Smith to go home?
A. No, sir.
Q. You deny keeping a whore house at Parsons?
A. Yes, sir.
Q. You deny keeping one at Muskogee?
A. I never kept any whore house at Muskogee, either.
(Witness excused.)

223 Mrs. LOUIZA WELCH, being recalled by the defendse for further cross-examination, was examined by Mr. Thomas Marcum and testified as follows, to wit:

Question. When were you married to John?
Answer. I have been married about 8 years, or a little over.

Q. Who married you?
A. Elder Broadauex married me.
Q. Married according to the laws?
A. I guess so. He was a State man.
Q. He was a preacher, wasn't he?
A. Yes, sir.
Q. Where were you on Monday night before this killing?
A. I was at the fair ground.
Q. At what place?
A. I was at the place where I had my stand.
Q. Where were you Tuesday night?
A. I was there.
Q. Do you remember to have attended a dance over there?
A. Yes, sir; I went to a dance, too.
Q. Where?
A. Right across over at Mrs. Hannah Mayfield's.
Q. That is the first tent on the left as you go into the gate, is it?
A. Yes, sir.
Q. How long were you there?
A. I wasn't there very long.
Q. How many sets did you dance?
A. I don't know; I never kept any account of them.
Q. You danced several, didn't you?
A. I don't know how many I danced. I didn't dance very much during the fair.
Q. Do you remember who you danced with?
A. No, sir; I don't. I danced once with Mr. Smith, if I am not mistaken.
Q. How many times did you dance with him?
A. I don't know. I never kept any account.
224 Q. You and he waltzed, didn't you?
A. Yes, sir.
Q. You waltzed several times with him, didn't you?
A. I don't remember of waltzing but once with him.
Q. How often have you been separated from your husband?
A. I don't know. We haven't been separated many times. About once or twice, I guess.
The ASSISTANT DISTRICT ATTORNEY. Your husband was not a citizen there?
A. No, sir.
Mr. THOMAS MARCUM (of counsel for defendant). Was your husband a weak or strong man?
A. I don't know how strong he was.
Q. He wasn't a sickly, weakly man, was he?
A. I don't know that.
Q. Don't you know he was said to be the stoutest man in the Creek country?
A. No, sir; I don't know anything about that.
Q. How much would he weigh?
A. I don't know that, either.
Q. Was he a large man or small man?

A. He was kind of large.
Q. Wouldn't he weigh over 200 pounds?
A. I don't know; I never asked him.
(Witness excused.)

225 Government rests.

226 The defendant, to maintain the issue on his part, introduced the following-named witnesses:

William Gentry, C. C. Ransom, Fred Virgil, Alex Coats, John Vann, Charley Shepherd, Roswell Mackey, James Smith, A. D. Brown, Charles Smith (the defendant), Alex Shoat, Dave Roberts, who testified as follows:

227 *Testimony introduced by the defense.*

WILLIAM GENTRY, having been duly sworn upon behalf of the defendant, was examined in chief by Thomas Marcum, esq., and testified as follows, to wit:

Question. What is your name?
Answer. William Gentry.
Q. Where do you live?
A. Muskogee.
Q. Do your father and mother live there?
A. Yes, sir.
Q. Do you know Charley Smith?
A. Yes, sir.
Q. Did you know Robert Marshal?
A. Yes, sir.
Q. John Welch?
A. Yes, sir.
Q. Were you at the fair there last September?
A. Yes, sir.
Q. Did you see the shooting of John Welch and Robert Marshal?
A. I seen some of it; yes, sir.
Q. State to the jury where you were when the shooting took place?
A. I was about 10 feet, I guess, maybe closer or a little further, from them when the shooting first took place.
Q. Just tell the jury what you saw?
A. I didn't see the first shot, but only heard the first shot fired, and turned around and seen the shooting. And the second shot I seen John Welch advance on Charley Smith there rapidly, and Charley was sort of in the act—looked like he was sort of stepping back, and the third shot John Welch was just in the act of turning.
Q. Where did John go?
A. John went over towards a stand there east of the shooting. I don't know exactly whose stand 't was, but I think it was Ketch Loren's stand.

228 Q. What direction was that from John Welch's stand?
A. That was east of John Welch's stand, across the street from John Welch's stand.

Q. About how wide was that street there?

A. Oh, it was wide enough for two wagons to pass, maybe a little wider.

Q. The first shot you didn't see?

A. No, sir.

Q. The second shot you turned and saw the other?

A. Yes, sir.

Q. Welch was going rapidly towards Smith?

A. Yes, sir; he was going right towards Smith.

Q. Then you saw the second shot?

A. Yes, sir.

Q. About how far was Smith from Welch when he fired the second shot?

A. I guess about two steps, maybe not so far.

Q. At the firing of the third what did Welch do?

A. Welch was just in the act of turning.

Q. Do you know which way he turned around?

A. I don't know exactly, but it seems to me like he turned to the right. I could not swear exactly which way he did turn, though.

Q. After that what did Charley Smith do?

A. Charley walked a little way from where he was standing and dropped his gun down by his leg, and just stood there and looked at Welch and walked away.

Q. How many shots did he fire there altogether at Welch?

A. Two; I seen two, and heard the first shot, but I didn't see it.

Q. Did you hear any more shooting?

A. Yes, sir.

Q. State about that.

A. Charley was standing there looking at John Welch, and Marshal rode up behind him and fired at him, and Charley wheeled—he had his back to Marshal—and he made some assertion to Marshal; I
229 think it was, "You have no right to shoot me," and by the time he got that word out of his mouth Robert was in the act of firing again, and Charley shot then. The shots went that way [indicating], and I never saw Robert when he fell. The crowd rushed in so I didn't see him fall.

Q. Was that all of the shooting there?

A. That is all the shooting I seen; but three or four minutes after that I heard them say that Jim Richardson got shot.

Q. Never mind that. Do you know how wide that street was, between these tents?

A. I think it was wide enough for two wagons; it might have been wider; I know that two wagons could pass there.

Q. Did you see any wagons in the street there at any time before the shooting?

A. Yes, sir; the streets were pretty well crowded with hacks running into town.

Q. Do you know anybody with any wagons that had driven in there before the shooting?

A. I know several people that had hacks there.

Q. Do you know Sam Newlin?

A. Yes, sir.

Q. How long had his wagon been gone out before the shooting took place?

A. Well, some of them wouldn't stay there only three or four minutes, and some of then 10 or 15, until they got a load.

Q. How long had these wagons been gone out when this shooting commenced?

A. I could not tell exactly how long they had been gone out. I didn't see any wagons there when I turned and saw the shooting.

Q. Do you have any idea how long they had been gone?

A. The crowd of wagons I seen, I guess it was about 10 minutes before the shooting.

Q. You say when Charley fired the last shot at Welch he backed
230 a little?

A. When Charley fired the last shot at Welch, Welch was just in the act of turning and going towards this stand.

Q. How was Welch approaching Charley? What attitude was he?

A. He was coming right fronting him, facing.

Q. Did you notice anything about his hands—what position they were in?

A. I think he had his right hand down by his side; I could not hardly see his right hand because he was coming this way towards Smith [indicating]. He just had his hand down like any man would, coming towards Smith.

Q. Which side of Welch was to you, right or left?

A. His left side was towards me.

Q. Then could you see his right hand?

A. No, sir; I just saw his arm and shoulder.

Q. What size man was John Welch?

A. He was a pretty big-sized man. A man I guess would weigh about 185 pounds.

Q. Do you know whether he was a strong or weak man?

A. He was a pretty strong man, well built.

Q. Do you know his character there in that community for being overbearing?

The COURT. There is nothing yet offered to let in character.

Mr. MARCUM (of counsel for defendant). All right. Will I be permitted to show his character for strength?

The ASSISTANT DISTRICT ATTORNEY. I suppose that is incompetent at this stage. I didn't object to it a while ago because I didn't think it amounted to anything.

The COURT. It is in already. It is unnecessary to repeat it. It is not competent, though.

231 Mr. MARCUM (of counsel for defendant). I didn't ask as to his character for st'ength.

The COURT. I don't think you can prove that anyway.

Mr. C. J. FREDERICK (of counsel for defendant). I understand it is always competent to prove the relative strength of the two combatants.

The COURT. That depends on the condition of the case. Up to this time it is shown there was a man unarmed, in the pursuit of his business, shot to death by this defendant. What difference does it make how strong

and large he may have been? Up to this time the defendant stands in the attitude of having committed a forcible trespass on this man, cut his reins, raised a disturbance there, commenced a difficulty, precipitated an affray, did that which might lead to a deadly result, and there is nothing at all shown so far that John Welch was armed, or that he made any demonstration of any kind. It would be clearly incompetent.

Mr. C. J. FREDERICK (of counsel for defendant). It wasn't the reins of the deceased that were cut. It was the reins of another person.

The COURT. It don't make any difference. If it was a thing that would likely precipitate a conflict, a wrong done by the defendant, something that he had no right to do——

Mr. C. J. FREDERICK (of counsel for defendant). That wasn't as between the defendant and deceased. We except to the ruling of the court.

The COURT. Yes.

Mr. MARCUM (of counsel for defendant). I will ask you in about what time these shots were fired? How long did it take?

A. Very rapid. About a second apart, the last two I seen.

232 Q. I am speaking of the first three; the first three shots that were shot at Welch.

A. They were rapid, right after one another.

Q. The last shot he was about two steps of him?

A. Yes, sir.

Q. And he was in the act of turning?

A. Yes, sir.

Q. That is the the third shot?

A. Yes, sir.

(Witness excused.)

233 C. C. RAMSON, having been duly sworn upon behalf of the defendant, was examined in chief by Mr. Thomas Marcum, and testified as follows, to wit:

Question. Where do you live?

Answer. Muskogee.

Q. Do you know Charley Smith, the defendant?

A. Yes, sir.

Q. Did you know Bob Marshal?

A. Yes, sir.

Q. Were you at the fair last September at Muskogee?

A. Yes, sir.

Q. You were present at the shooting of Welch and Marshal?

A. Yes, sir.

Q. Where were you at that time?

A. I was a little southeast of the shooting, across the street.

Q. State what you saw. Where was the shooting at?

A. It was at the grounds there.

Q. Do you know where John Welch's tent was?

A. Yes, sir.

Q. And where Tackey Grayson's and Charley Smith's?

A. Yes, sir.

Q. How were they situated?

A. They were right close together; I guess there was a couple of feet betwixt them; they were almost joined.

Q. What direction was the tent of Smith's from Welch's?

A. North.

Q. I mean Charley Smith.

A. South.

Q. What direction were you from his tent?

A. Southeast.

Q. Were you near any tent?

A. I was near Charley's tent—his dance hall; right at the corner of it.

234 Q. State to the jury the first thing you saw and heard.

A. The first thing I saw was Mr. Fullsom says to me, "Them fellows is going to fight over there," and I looked around and Charley Smith was coming from the gate going south, and John Welch came out behind him and says, "Here I am, God damn you, if you want anything," and run up to Charley, and Charley run in his own tent, and he came back out, and just as he got to the door John Welch went to grab him; had his right hand behind him and went to grab him; Charley shot him.

Q. How many times did he shoot?

A. He shot him three times—shot at him three times.

Q. How fast were the shots fired?

A. They were just as fast as you could shoot a pistol.

Q. What did Welch do?

A. At the last shot, just as he fired the last shot, Welch turned and walked away, and as he turned Charley threw the six-shooter down that way and stood there watching him.

Q. Where did Welch go after that?

A. He walked over to the other dance hall, and whether he went in or not I don't know; he went over to Ketch Loren's dance hall.

Q. What became of Charley?

A. Charley stood there, I guess, for three or four seconds, until Robert Marshal fired at him.

Q. What direction was Marshal?

A. Bob Marshal was behind Charley Smith.

Q. Do you know how far he was behind him?

A. No, not exactly; I guess he was as far as from here to the back end of the house, or maybe a little bit further.

235 Q. What direction was he from Smith?

A. South.

Q. How far was Smith from his own tent at that time?

A. He was right in front of it.

Q. Which side of the street was Marshal on?

A. Marshal was on the west side.

Q. That was the same side of Smith's tent, then?

A. Yes, sir.

Q. What did Marshal do?

A. The first I seen of Marshal he fired at Charley.

Q. Where did the ball hit, do you know?

A. The ball hit just about seven or eight feet west of Charley, on the ground.

Q. What did Charley do then?

A. Charley turned around and spoke to him. He says, "Robert, you have got no right to shoot at me," and at the time he done that Robert ranged his pistol to shoot again and was throwing it down, and his horse jumped and he threw his pistol up, and he was trying to rein his horse with his left hand, and when he reined his horse's head back towards Charley, jist as he was leveling his pistol over Charley fired again, and his pistol went off the same time.

Q. Marshal fired twice?

A. Yes, sir.

Q. Do you know how many shots altogether were fired?

A. There was several.

Q. There was three at Welch by Charley?

A. Yes, sir; and one at Robert Marshal. And Robert Marshal shot two at Charley.

Q. That is six.

A. And this Indian fellow shot one at Jim Richardson.

Q. I am not asking about that. That was sometime afterwards, wasn't it?

A. That was just after the shooting.

Q. That was out at the front gate?

A. Yes, sir.

Q. There were six shots up there just at the time of the shooting?

A. Yes, sir.

236 Q. Now, how close were these other shots at Welch together? How fast did they fire?

A. They were as close as a man could cock a six-shooter and shoot.

Q. How fast was Welch going at Smith when Smith fired at him?

A. He was rushing right at him.

Q. Just rushing right at him?

A. Yes, sir.

Q. Do you know where he had his right hand?

A. He had his right hand behind him.

Q. Did you see Charley as he went from Welch's tent to his own?

A. Yes, sir; I seen him as he was going on down——

Q. How fast was Welch after him when he started?

A. He was just rushing out after him. He stumped his toe as he went to go out of his own door.

Q. Who did?

A. John stumped his toe as he came out of the door, or he would have caught Charley before he got there.

Q. Right after Charley?

A. Yes, sir.

Q. How fast did Charley go?

A. He went in a rush; walked as fast as a man could walk without running.

Q. Where did he go?

A. In his own tent.

Q. How long until you saw him again?

A. Just in two or three seconds. He came right straight back out.

Q. Immediately out of his door?

A. Yes, sir.

Q. Then where did the shooting occur by Charley?

A. Right there in his own door. He was about two steps from his door, I suppose.

Q. Do you know what Welch was saying to him at that time?

A. No, sir; I do not. I heard some talk, but then I could not understand it.

237 Q. Do you know what he said back at the tent?

A. He come out, and says, "Here I am, God damn you!" That is what John said when he came out of the tent.

Q. What was he doing then?

A. He was rushing towards Charley.

Q. Coming right towards him?

A. Yes, sir; with his hand behind him.

Q. Which hand was behind him?

A. His right hand.

Q. Which direction was Marshal—or Smith, I mean, shooting at Welch? What direction were these three shots fired in?

A. He was shooting northeast.

Q. Northeast?

A. Yes, sir.

Q. How far was John Welch from his tent—from his own tent?

A. He was right close. He was in front of Charley's, and right close to his own.

Q. What part of Charley's tent was he nearer to?

A. The northeast corner.

Q. That is the same time that Charley fired the first shot?

A. Yes, sir.

Q. About how close was Welch to him when he fired the first shot?

A. He was almost in hand's reach distance of him.

Q. How close at the second shot?

A. He could have reached him, I suppose.

Q. Just explain why he was closer at the first.

A. He was going on to Charley, and Charley backed back.

Q. At the second shot how were they standing? What was their position?

A. Facing each other. His left side was to Charley, quartering.

238 Q. And then at the third shot what was the position of Welch?

A. At the third shot he was firing so rapidly—just as he fired the third shot I think he wheeled and turned.

Q. That is the last shot that Charley fired?

A. Yes, sir.

Q. At the time Marshal fired the first shot at Smith, how was Smith standing with reference to Marshal?

A. Smith's back was to him.

Q. Did you hear Marshal say anything to Smith except what you have stated?

A. No, sir; I was there—in there betwixt the two, and I never heard him say a word.

Q. He never said a word?

A. No, sir; if he had spoke a word I would have heard it.

Q. Had you seen Bob Marshal that morning?

A. I saw him up town.

Q. Was he drunk or sober?

A. He wasn't drunk, but he was pretty full when I saw him. He had been drinking.

Q. I want to ask you what size man was Welch?

A. He was a large man. He weighed about 200, I guess, and 10 or 12.

The ASSISTANT DISTRICT ATTORNEY. I object to that question.

Mr. MARCUM (of counsel for defendant). I just asked as to his size. Your honor refuses us to ask the other question as to his size.

The COURT. Well, that is already in.

Mr. MARCUM (of counsel for defendant). I wish you would describe to the jury this dance hall of Smith's, on the east side? What is it made of?

A. Lumber.

Q. State how the front is fixed up?

A. There is 12-inch plank nailed up, I guess, to a man's shoulder, right along up here there was a plank knocked off. The door faces the west.

239 Q. I will ask you if a man setting down five or six feet from the front door of that dance hall could have seen any of this shooting?

A. No, sir; he could not have seen it.

Q. Why?

A. Because the plank was nailed up; there was no hole only up to a man's shoulder and he could not have seen there a man setting down; he couldn't have seenn a man's head setting down.

Q. It would have been impossible for a man to see the shooting he *he* was setting back five or six feet inside?

A. Yes, sir.

Q. I will ask you if you know where the seats are located inside of that dance hall?

A. Yes, sir.

Q. Where?

A. On the east side there is seats, and on the south side there is seats, and on the northeast side and on the east side there are no seats at all.

(Witness is shown diagram.)

Q. How far from the front here did the seats begin?

A. The seats run along here by the side, by the door, and then the seats run over here clear back to here on this side [witness indicates position of seats on diagram]; and back at the back end was where the stand was; on this side there was a little short seat; there was only three or four that could set down on that side.

Q. If a person was sitting on the north side—how far back is that seat from the front?

A. It is right at the front; it is at the north corner.

Q. Could a man sitting on that have seen the shooting?

A. No, sir; he could not; the shooting would have been behind him.

Q. I will ask you if you saw any women at the time of this shooting?

A. No, sir; I did not; I seen Tackey Grayson's wife and daughter.

240 Q. Did you see any white man there?

A. No, sir.

Q. Did you notice whether or not there was anybody about Welch's tent—any white people?

A. No, sir; I saw Welch's father-in-law after the shooting.

Q. Do you know this man Frances Brooks, a white man, who is a witness here?

A. No, sir.

Q. Have you seen him since he has been here?

A. Not to know him.

Q. Do you know George Turner?

A. Yes, sir.

Q. Did you see anything of him at the time of the shooting?

A. I didn't see anybody; but Walter Mackey and Jim Roach was the only two men I noticed.

Q. I will ask you to state if at any time before the shooting there was any wagons there or not.

A. Yes, sir; before the shooting; but at the time of the shooting the wagons had all moved.

Q. How long before the shooting was it that the wagons had left?

A. I don't just exactly know how long; but when Charley came on down the street just before the shooting there wasn't any wagons there at all.

Q. Do you know where Charley had been?

A. He had been to the gate.

Q. What direction was he coming in when you first saw him?

A. Coming from the north; going south.

Q. Did you see him when he got to Welch's tent?

A. Yes, sir; I saw him just as he was passing Welch's tent.

Q. When he passed the tent what took place?

A. John come out behind him and cussed; that is the time it began; he says, "God damn you, here I am," and that is the time it began.

241 Q. Can you state to the jury whether or not Smith spoke at all as he passed?

A. He did not speak.

Q. Can you give about the time these wagons had been gone?

A. The buggies were moving off down, going south, and the wagons were out in the streets.

Q. Did you see Sam Newlin there?

A. No, sir; he was in his wagon going towards the fair ground.

Q. How far were you from Charley Smith's dance hall?

A. I was at the corner of it, nearly at the south corner, in the street.

Q. Did you see anybody out there at or near Smith't tent, on the other side, at the time the shooting commenced?

A. No, sir; I seen one or two men on that side, but I didn't know who they were.

Q. Do you know John Jacobs?

A. No, sir; I might know him, but I don't know him by that name.

Q. Do you know Jim Armstrong?

A. Yes, sir.

Q. Did you see anything of him?

A. No, sir; I didn't then. He had been playing a fiddle over at the dance hall before.

Q. Do you know how long before that he had been playing the fiddle?
A. Oh, it had been an hour or such a matter since they had a dance in there.
Q. Do you know Dave Harrison?
A. I don't believe I do.
Q. Did you see this man Triggs there?
A. No, sir; I seen Triggs at the merry-go-around as I came on down there.
Q. How long had you been from the merry-go-around?
A. I just come from there and stopped there where Fullsom was with the chuck-a-luck, watching them.
242 Q. What was Triggs doing at the merry-go-around when you left him?
A. He was talking with some ladies that lived in Checotah. I don't know who the ladies were.
Q. How long after that was it until the shooting began?
A. I had just left there and went to the south corner of this dance hall.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. What were you doing there?
A. I just went out there to be agoing and have some fun.
Q. What business were you running out there at all?
A. None at all.
Q. Gambling?
A. No, sir.
Q. Were you ever arrested on any charge?
A. Yes, sir.
Q. What?
A. Murder.
Q. When?
A. About seven or eight months ago.
Q. Where?
A. In Muskogee, and brought here.
Q. What was done with the case?
A. I come clear.
Q. What else have you been arrested for?
A. For fighting and getting drunk.
Q. Where were you arrested on that charge?
A. Here in town.
Q. What else?
A. That is about all that I know of.
Q. Were you ever sent to the penitentiary from this court?
A. No, sir.
Q. From any court?
A. No, sir.
Q. What have you been in the Muskogee jail for recently?
A. Gambling.
243 Q. You didn't tell us anything about that. How long were you in jail?
A. Thirty days.
Q. When did you get out?

A. The next day after Christmas Day.
Q. How many times have you been in the Muskogee jail?
A. Two or three times.
Q. How many times have you been in other jails?
A. Once or twice.
Q. How many times have you been in the jails at Ft. Smith?
A. Twice.
Q. Both times for what?
A. For fighting and getting drunk.
Q. Did you ever live here?
A. Yes, sir.
Q. Wasn't there some charges of larceny against you here?
A. There never was.
Q. Are you any akin to Smith?
A. No, sir.
Q. How much does Smith weigh?
A. I don't know. He looks to weigh about 165 or 170.
Q. How much do you weigh?
A. 185.
(Witness excused.)

244 WILLIAM GENTRY, recalled for further cross-examination by the Government.

By the ASSISTANT DISTRICT ATTORNEY:

Q. What is your business?
A. My father runs a restaurant and hotel there, and I work for him.
A. Did you have any ill feeling against Robert Marshal?
A. No, sir.
Q. Was Robert Marshal and your father at outs?
(Objected to. Question withdrawn.)
Q. Have you ever been arrested on any charge?
A. Yes, sir.
Q. What.
A. I was arrested at Muskogee for perjury.

Mr. C. J. FREDERICK (of counsel for defendant). We object to the question as to whether or not he has been arrested. He may ask him whether he has been convicted.

The COURT. I think it is competent.

Mr. C. J. FREDERICK (of counsel for defendant). We save an exception.

The ASSISTANT DISTRICT ATTORNEY. You were arrested for perjury?
A. Yes, sir.
Q. The case is now pending against you at Muskogee, is it not?
A. Yes, sir.
Q. What else have you been arrested for?
A. Fighting and shooting craps.
Q. What else?
A. That is all I remember—I was arrested once for burglary, but I beat the case. I came clear.
Q. Where?
A. In Kansas.

245 Q. What else?
A. That is all I remember.
Mr. MARCUM (of counsel for defendant). You have not been convicted of anything except these crap games?
A. That is all.
The ASSISTANT DISTRICT ATTORNEY. You have not been tried for perjury yet.
Mr. MARCUM (of counsel for defendant). I will ask you if you did not insist on a trial at the last term of court?
A. Yes, sir.
Q. I will ask you if there was any witnesses against you there at the last term of court?
A. Yes, sir.
Q. How long has that been pending there?
A. I have been ready for trial at two terms.
(Witness excused.)

246 FRED VIRGIL, having been duly sworn upon behalf of the defendant, was examined in chief by Mr. Thomas Marcum, and testified as follows, to wit:

Question. Where do you live?
Answer. Muskogee.
Q. Do you know the defendant?
A. Yes, sir.
Q. Did you know Marshal in his lifetime?
A. Yes, sir.
Q. And Welch?
A. Yes, sir.
Q. Were you at the fair last September?
A. Yes, sir.
Q. Where were you when the shooting of Welch and Marshal occurred?
A. I was right across the street.
Q. Describe the grounds theere.
A. I was on the east side.
Q. Describe the grounds there where it was done, if you can.
A. It was right in kind of a place that is laid off there for tents.
Q. Which side of the street was it?
A. It was on the west side, the shooting was.
Q. On which side of that lot was the tent row?
A. On the south.
Q. How does the main street run there?
A. It runs east and west.
Q. The tent row is on the south side?
A. Yes, sir.
Q. How does the street between the tents run?
A. North and south.
Q. How did they enter that tent row from the main street?
A. There is a gate there to go in.
Q. How far did these tents extend back from the gate?
247 A. It was about twice the length of this house; about that far back.

Q. Do you know where Charley Smith's dance hall was?
A. Yes, sir.
Q. Which side of that tent street was it on?
A. He had one on the west side and he had one on the east side. He had a tent on the west side and a dance hall on the east side.
Q. What direction was the dance hall from his tent?
A. Right across the street—right straight across from his tent.
Q. Did you notice as to that particularly, about the directions there of these tents?
A. Yes, sir; it seems to me like they were right straight across there.
Q. Where were you when the shooting occurred?
A. Right straight across the street from him.
Q. State now to the jury how it occurred.
A. I was standing on the east side of the street, and Charley Smith came back from the gate, and John said something to him, and Charley went up there and spoke to John.
Q. Do you know what John said?
A. No, sir; I didn't understand what he did say at first.
Q. Do you know what Charley had been to the gate for?
A. To get the wagons out.
Q. State whether there were any wagons in there or not.
A. There wasn't many in there; there was a few.
Q. I mean at the time of the shooting, was there any wagons?
A. No, sir; the wagons were all on the outside of the gate. Pretty near all of them.
Q. How long had they been out when the shooting commenced?
A. They had just got out. They were all out.
Q. Charley was coming back from the gate?
A. Yes, sir.
248 Q. Now state what occurred.
A. He says to John, "God damn you, you want to take it up, do you?" And John says, "Yes, God damn you, I will take it up. What in the hell will you do about it?"
Q. What did John say to Charley before that?
A. I didn't understand what he did say about it.
Q. And Charley was passing his tent, was he?
A. Yes, sir.
Q. John said something, and then Charley asked him that?
A. Yes, sir; asked him if he took it up.
Q. What did John say then?
A. He said, "Yes, God damn you, I will take it up. What in the hell will you do about it?" Charley started to his tent, and John jumped up and started after him.
Q. How fast did John go?
A. John came pretty fast?
Q. How fast did Charley go?
A. Charley went pretty fast. Went on in his tent, and was coming out, and when I saw him coming out he had a gun in his hand, and John rushed on him with one hand behind him, and Charley shot, and John run again, and he shot again, and as John was turning Charley shot again.

Q. What did John do then?
A. John turned around and walked across the street.
Q. Where did he go?
A. Over there to Ketch Loren's dance hall.
Q. How far is that from John Welch's tent?
A. It is about as far as from here to you or a little further [indicating about 20 feet].
Q. What did Charley do?
A. Charley walked across from there where I was, pretty close to me, about six or eight feet of me.
Q. What was he doing?
A. Had his gun down in his hand looking towards John.
249 Q. Then what occurred?
A. Robert Marshal shot at him from behind.
Q. How far was Marshal from Smith?
A. About as far as from here to the end of the room, I guess.
Q. How was Marshal situated?
A. He was on a horse.
Q. Do you know where the ball struck?
A. No, sir; he aimed down like this, off the horse [indicating].
Q. Towards who was Marshal shooting?
A. Charley.
Q. I will ask you to state to the jury if he said anything—Marshal?
A. No, sir; I never heard him say a word.
Q. Then, what occurred next?
A. I got scared then and run.
Q. What did Charley do?
A. I never seen Charley any more after that.
Q. How many shots did you hear fired then?
A. I hadn't gone nowhere before I heard two more shots fired in rapid succession.
Q. Where did you go?
A. I run behind Charley's dance hall and came right on back in front on that street, and I went up there and I saw the fellow when he shot at Jim Richardson.
Q. That was where?
A. At the gate.
Q. At the north end of these tents?
A. Yes, sir.
Q. Do you know about how long it was from the last shot of Smith's until Marshal fired on Smith?
A. He had time to talk from the other side of the street over there where I was.
Q. Who did?
A. Charley did.
Q. Where was Welch then?
A. Welch had gone and leaned up against this place of Ketch Loren, the dance hall.
Q. How far was that?
A. It was as far as from here to you, about, from John's tent.

250 Q. State whether or not Welch had got to Loren's before Charley was fired at.

A. Yes, sir.

Q. Did you see Marshal afterwards?

A. I saw him after he was killed.

Q. Do you know where he was shot?

A. He was shot right in the road, I guess.

Q. Where was he hit?

A. I don't know; I didn't examine him.

Q. I will ask you how these other shots were fired at Welch; what time between them?

A. They were shot in rapid succession.

Q. How close was Welch to Smith when he fired the first shot?

A. Welch was advancing towards Smith about as far as from here to that iron there, and Charley shot, and he run on to Charley again, and the second shot he was almost against him, right close to him.

Q. What did Welch do then?

A. Welch turned then. As he was turning Charley shot again, and I saw the blood gush out of his mouth.

Q. I will ask you if he fired a single shot at him after he turned and walked off?

A. No, sir.

Q. Do you know what that dance hall of Smith's was made of?

A. It was made of wood—board.

Q. How was the front of it?

A. The front of it had a door in this end [indicating].

Q. Door on the street?

A. Yes, sir.

Q. How was the front part of it?

A. It was boarded all up in front.

251 Q. If a man was setting five or six feet back in that dance hall could he have seen this shooting?

A. No, sir; he could not.

Q. Did you see anything of George Triggs?

A. No, sir.

Q. State whether or not anybody was about Welch's tent.

A. I never saw anybody about there at the time of the shooting. I seen some ladies on the east side.

Q. Was there any white men around there about Charley's tent?

A. No, sir; I never saw any white men around there at all. I know there wasn't, because I looked.

Q. Do you know this man Frances Brooks, a white man?

A. Yes, sir.

Q. Did you know him up there?

A. Yes, sir.

Q. Did you see him there at the fair ground?

A. Yes, sir; I did.

Q. When did you see him last?

A. I saw him two days before the shooting.

Q. Did you see him after that?

A. No, sir; he told me he was going to leave.

Q. And you saw him no more afterwards?
A. No, sir.
Q. State whether he was there at Welch's tent or not.
A. No, sir; he wasn't.
Q. Do you know John Jacobs?
A. No, sir.
Q. Dave Harrison?
A. No, sir.
Q. Sam Newlin?
A. Yes, sir.
Q. Did you see him there that day?
A. I seen him on the wagon.
Q. Where was the wagon? How long had he been gone?
A. I saw him about two minutes before the shooting, driving on the outside.

Q. How fast was Welch going after Charley when he shot?
252 A. He was advancing pretty fast on him.
Q. Just describe how he was going.
A. He had one hand behind him.
Q. Which hand was that?
A. His right hand.
Q. Explain what attitude he was in.
A. Just like this [indicating], and he was rushing at him; one hand behind him.
Q. Could you see his right hand from where you were?
A. Yes, sir; it was right straight across from me.
Q. Could you tell whether he had anything in it or not?
A. I never seen anything in it.
Q. Was his right hand in such a position as to whether Smith could have seen it?
A. No, sir; he could not have seen it the way he was going.
Q. What was he doing at the second shot? What was his attitude?
A. The same way.
Q. At the second shot what was Welch doing?
A. He was rushing on him.
Q. And the third?
A. He was turning just as Charley shot the third shot.
Q. Did you see any blood as Welch walked off?
A. Just as he shot the third shot I seen the blood gush out of his mouth.
Q. Out of whose mouth?
A. John Welch's mouth.
Q. What was he doing when the blood was gushing out?
A. He was turning.
Q. Was there any more shots fired at him afterwards?
A. No, sir.

253 Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. How long have you lived up there?
A. That is my home.
Q. Have you ever been arrested for anything up there?
A. No, sir.

Q. Have you ever been arrested anywhere for anything?
A. Yes, sir; once.
Q. What for?
A. For a charge of larceny?
Q. Where?
A. Parsons, Kansas.
Q. What was done with you?
A. I served three months.
Q. You were convicted?
A. Yes, sir.
Q. And got three months in the county jail?
A. Yes, sir.

Redirect examination by Mr. THOMAS MARCUM:

Q. Where were you born?
A. In the Creek Nation.
Q. Are you a citizen of the Creek Nation?
A. Yes, sir.
Q. You are no akin to Charley Smith here, are you?
A. No, sir.
Q. Not related to him in any way?
A. No, sir.
(Witness excused.)

254 ALEX COATS, having been duly sworn upon behalf of the defendant, was examined in chief by Mr. Thomas Marcum, and testified as follows, to wit:

Question. Where do you live?
Answer. Muskogee.
Q. How long have you lived there?
A. All my life.
Q. Do you know the defendant?
A. Yes, sir.
Q. Did you know John Welch and Bob Marshal?
A. Yes, sir.
Q. Were you at the fair there in September?
A. Yes, sir.
Q. Where were you when Welch and Marshal were shot?
A. I was at my stand.
Q. Where was that with reference to Welch's?
A. Next to his.
Q. What direction?
A. North.
Q. Did Charley Smith have a tent there?
A. Yes, sir.
Q. Where was that?
A. That was south of Welch's, the one across the street on the east side.
Q. What direction was the one on the east side from his on the west?
A. It was southeast.
Q. What was the one on the east side there, the dance hall, made of?
A. Planks.

Q. How was the front fixed up?
A. It was sloping back down; high up front.
Q. What was the front made out of?
A. Planks also.
Q. Was the front open, or how was it arranged?
A. It was all closed up.
Q. I will ask you if a man setting back there in five or six feet
255 from the front, in the dance hall, could have seen this shooting?
A. No, sir.
Q. You say you saw the shooting?
A. Yes, sir.
Q. Tell the jury how it was. First, I will ask you if there was any wagons in there at that time?
A. Yes, sir; there was one or two.
Q. How many were in there?
A. I could see one or two, and they were back towards the gate.
Q. What became of them?
A. They went out.
Q. How long did they go out before the shooting, or did they go out before the shooting?
A. I think some of them were going out as the shooting began.
Q. Go on and tell the jury how the shooting occurred.
A. Well, I seen this man Smith come back from the gate, and as he was coming back I seen him step over towards his tent, where they got to fussing rather, and I could not see exactly what was done; but, anyway, I seen Welch rush out to Mr. Smith and rush into another tent——
Q. How fast did Welch come out of his tent?
A. He came out in a great hurry.
Q. What did Smith do?
A. He rushed on by his tent.
Q. How fast did he go?
A. I could not name how fast he went, but he went real fast.
Q. How long was it after he went in until he reappeared at the door?
A. It wasn't more than a second, I know.
Q. Where was Welch when he appeared at the door?
A. He was approaching faster towards the direction he went, and just as he turned out I saw him coming and go that way, and the shooting began.
256 Q. How far was Welch from Smith when Smith fired the first shot?
A. He was close; I could not name the distance.
Q. How close was he to Smith when Smith fired the second shot?
A. Still going towards him. He hadn't turned at the *that* until the second shot, and then he turned.
Q. How many shots altogether were fired?
A. Three.
Q. I mean at Welch. Now, what was Welch doing at the firing of the third shot?
A. It seems as though he was turning around. He turned at the second shot, was turning; when the third shot was made he was in the act of turning, rather.

Q. Did you see any blood?
A. Yes, sir; I seen the blood gush from his mouth.
Q. After which shot?
A. After the third shot.
Q. Then where did Welch go?
A. He went northeast.
Q. To what place?
A. I think it was Ketch Loren's place.
Q. Do you know how far that was from Smith's tent?
A. I could not name the distance, but it was northeast.
Q. What did Smith do when Welch went off?
A. He stood there a second or two, a few minutes; was standing there in the road, looking the direction he went.
Q. What occurred next?
A. This policeman, by the name of Marshal, rode up and shot at this man Smith one shot.
Q. Did you see where the ball struck?
A. Yes, sir; it struck the right or left of him, I don't know which, but it knocked the dirt up right by the side of him.
Q. Then what occurred?
A. This man Smith he turned and shot.
Q. What did Marshal do?
257 A. Marshal was in the act of shooting the second time when this man shot him, and the gun went off up that way.
Q. Then Marshal fired twice?
A. Yes, sir.
Q. What direction was he shooting?
A. North.
Q. Do you know where Mr. Mintor lives?
A. Yes, sir. He lives right in front of the fair-ground gate, and north.
Q. What gate?
A. The big gate.
Q. This tent street gate?
A. Yes, sir.
Q. I will ask you if you saw a bullet hole after that in Mintor's house?
A. Yes, sir.
Q. How far from the ground was it?
A. Six or eight feet.
Q. Where is that bullet hole in the house relative to where Marshal stood, this front gate?
A. As near as I can remember it is between the east corner of the house and the door.
Q. Drawing a line from where Marshal was to that bullet hole, how far would it miss the gate, or would it miss it?
A. The gate was on a direct line with the range of the ball.
Q. State what the attitude of Welch was when Smith shot at him the first time?
A. He was rushing towards him.
Q. Did you notice what position his hands were in?
A. He had his body turned sort of sideways, it seemed like.

Q. Which side was next to Smith?
A. It was the east side of him; right side.
Q. Which side of Smith was towards his tent?
A. I can't remember now, but he was rushing right towards him.
Q. I know, but Smith, you say, came out of his tent. Which way did he turn?
A. He turned to the right, to the north.
Q. Then that threw his left side to his tent?
A. Yes, sir; that is correct.
258 Q. Welch was going south?
A. Yes, sir.
Q. That threw Welch's right side to Smith's tent?
A. Yes, sir.
Q. How rapid were these three shots fired?
A. They were done quickly.
Q. About how quick?
A. It was just right quick.
Q. Did Marshal say anything?
A. I never heard him say a word.
Q. Did you hear anything from Smith; that is, when he shot Marshal?
A. I think he said, What do you want to kill me for?
Q. I will ask you if you saw any women at the time of the shooting there near by?
A. No, sir.
Q. State whether or not anybody was about Welch's tent at the time of the shooting?
A. I didn't notice particularly as to anybody but Welch and Smith.
Q. Did you see any ladies down near where the shooting was going on?
A. No, sir.
Q. Did you see anybody near Welch's tent?
A. No, sir; if they were there they were in the inside.
Q. Do you know this white man called Frances Brooks?
A. No, sir.
Q. Was there any white man there that you know of?
A. I didn't see any at the time.
Q. Did you see any white person there immediately afterwards?
A. There might have been, but none I can remember of.
Q. No women and no white men?
A. No, sir.
Q. Do you know John Jacobs?
A. Yes, sir.
Q. Did you see him there anywhere?
A. No, sir.
Q. Do you know Armstrong, the fiddler?
A. Yes, sir.
259 Q. Did you see him there?
A. No, sir.
Q. Do you know where Dave Harrison was?
A. No, sir.
Q. Do you know wheere this man Richardson was?

A. Well, I seen Jim Richardson.
Q. Where was he?
A. I didn't see him until he got shot.
Q. Do you know where he went from with that horse?
A. No, sir.
Q. State to the jury whether or not any horses were kept there about those tents.
A. No, sir.
Q. Was there any room there for horses?
A. No, sir.
Q. Where did Richardson get this horse?
A. That was Bob Marshal's horse.
Q. Do you know what become of his horse after the shooting?
A. No, sir; I don't.
Q. Do you know where Richardson got him?
A. Got him south there somewheres; I don't know where.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. I suppose you would not have seen Jim Richardson there if he had not got his arm shot, would you?
A. Yes, sir; I seen him shot. I didn't see him until he got shot.
Q. Therefore, if he had not been shot you would not have swron that he was there, but that he wasn't there?
A. Very likely; yes, sir.
Q. There wasn't a white man on the ground, was there?
A. I didn't see any at that time, sir.
260 Q. Wasn't that tent street filled with people at the time when the shooting first commenced?
A. Yes, sir.
Q. Men and women, too, wasn't there?
A. I don't know; there was a good many there.
Q. Wasn't there men and women there at the 'ime the shooting commenced?
A. I suppose there was.
Q. Who were they?
A. I could not tell you.
Q. Why don't you know?
A. Because I don't know that it is reasonable that I should know.
Q. You heard Smith say something, didn't you?
A. Yes, sir; I heard him say something.
Q. What did he say?
A. He only said, "What do you want to shoot me for?" That is all I heard him say.
Q. He said that to Bob Marshal?
A. Yes, sir.
Q. What did Marshal say?
A. I didn't hear him say nothing at all.
Q. He may have spoken, and you didn't know what he said?
A. I didn't hear him say anything.
Q. Did you see Fred Virgil around there?
A. Yes, sir.
Q. What do you do at Muskogee?

A. I work around home generally, and in the hotels.
Q. What hotel?
A. Adams Hotel.
Q. Have you ever been arrested for anything?
A. No, sir.
Q. How old are you?
A. 21.
Q. What were you doing out there the day the killing took place?
A. I was running a little confectionery stand. The first stand north of Welch's, on the west side.
261 Q. Was that where you were when this killing took place; when this difficulty came up?
A. Yes, sir; standing on the outside.
Q. Were you standing on the outside when the first shot fired?
A. Yes, sir.
Q. Did you see the parties when the first shot fired?
A. Yes, sir.
Q. You heard them quarreling before the shot was fired?
A. They were saying something, but I don't know exactly what; they were fussing.
Q. They were quarreling, then, before the first shot was fired?
A. Yes, sir.
Q. You saw Welch come out *off* his tent, did you?
A. Yes, sir.
Q. Go in the direction of Smith?
A. Yes, sir.
Q. You saw Smith come the other way?
A. Yes, sir.
Q. Smith went into his tent?
A. Yes, sir; in a hurry.
Q. And came out with a revolver in his hand?
A. Yes, sir.
Q. And came meeting the other man?
A. They were meeting each other.
Q. Then he came meeting the other man?
A. Yes, sir; the other man rushed towards him.
Q. They were both advancing, were they not?
A. Well, they were going pretty fast.
Q. Were they both advancing on each other?
A. It seems as if Mr. Smith retreated, and Welch come pursuing.
Q. If he had rushed, the man would have found him in his tent. He got the pistol, and came rushing ou' with his pistol just about as fast as hee went in?
A. Yes, sir.
Q. He wasn't retreating when he came out of the tent, was he?
262 A. He retreated afterwards.
Q. Was he retreating then?
A. He retreated when Mr. Welch rushed on him.
Q. So he could get back and fire?
A. I don't know what it was for.
Q. The man was a little bit too close for him, and he wanted to get back so he could fire, and kill him at the first shot?

A. No, sir; this man was rushing on him.
Q. What do you mean by rushing?
A. Coming on him in a hurry.
Q. In a dead run?
A. No, sir.
Q. What do you mean by rushing?
A. He was coming faster than ordinary speed.
Q. Then the place where they met was in front of Charley Smith's tent, was it?
A. No; not exactly.
Q. Don't you know that Charley Smith never went into his tent to get the pistol?
A. I think he did.
Q. Don't you know that he went into an'ther tent south of that, and got the pistol?
A. No, sir; I saw him rush into his tent; I suppose it was his.
Q. Do you know whose pistol he got?
A. No, sir.
Q. Welch was going fastern than Smith, wasn't he?
A. He was going pretty fast.
Q. Fastern than Smith?
A. I could not say that: but I noticed that Smith kept backing.
Q. You say that Smith was just coming along, and you say that Welch was rushing; now that means that Welch was going faster than Smith; isn't that what you intend?
A. No, sir.
263 Q. Which one was going the faster?
A. Welch was rushing on to Smith pretty fast, and he retreated until he was shot.
Q. Which one was going faster?
A. I could not say.
Q. Don't you know if Welch had been going faster than Smith that Welch would have caught Smith before Smith got into the tent where he got the pistol—if he was rushing at such a rapid rate as that?
A. He run out of his tent in a hurry——
Q. You have used the word "rush" as appl'ed to Welch all the time. Don't you know if Welch had been rushing after Smith, as you say, if he had been going faster than Smith, he would have caught Smith before Smith got into the tent? That is a fact, is it not?
A. I don't know.
Q. They were right together when they first started here, when they first quarr'led, were they not?
A. No, sir; they were not right together.
Q. They were standing as close as from me to Mr. Rider, were they not?
A. They were standing pretty close together.
Q. That close together?
A. I could not name the distance.
Q. About how far apart were they when you first saw them?
A. I wouldn't like to name the distance.

Q. You can tell what your opinion is. You stated it awhile ago when you were talking to these other gentlemen. You stated they were there right together.

A. Not far apart.

Q. You stated awhile ago they were right together, and now you say they were not far apart. Then you state that Smith whirled, and went into his tent, and the other man rushed at him. Now, if he had done that he would have caught him before he got into the tent, wouldn't he?

264 A. I don't know whether he would or not. He didn't catch him.

Q. He didn't try to catch him, did he?

A. It looks as though he did; yes, sir.

Q. Then he could have caught him, because he was right at him. You have said that he was right at him, and that he was rushing on him; now, if he had wanted to have caught him, he could have caught him. Isn't that right?

A. I don't know; he didn't catch him.

Q. Then he didn't want to catch him, did he?

A. I could not say that.

Q. Don't you know that he never run after him at all?

A. I know that he did.

Q. Don't you know that he simply walked out, and that the two men met right at the corner of that tent, and were they not surprised when they met each other, each of them?

A. I could not say about the surpriseness.

Q. When they met and rushed together, didn't Smith fire at him at once, quickly?

A. He retreated.

Q. How far did he retreat?

A. He was going backwards, I could not say how far.

Q. How many steps backward did he take?

A. I could not say that.

Q. About how many?

A. I could not say that.

Q. Did he take 100?

A. No.

Q. Did he take as many as 100?

A. Not so much extreme as that.

Q. You see you do know something about it now. What is your opinion about it?

A. I could not name the space he went.

265 Q. I asked you for your opinion?

A. He went backwards a piece.

Q. Well, how much? What is your recollection about it?

A. He went about half the length of those tables—just about from that man's foot to the end of that paper.

Q. How many times did he shoot while he was going back that far?

A. He shot twice.

Q. All that time the other man was rushing on him?

A. Yes, sir.

Q. You still insist that he was rushing on him?

A. Yes, sir; he was in the act of turning at the third shot.
Q. But before he turned he kept rushing until he turned?
A. He was rushing until the two shots were made.
Q. He was rushing on him?
A. Yes, sir.
Q. That means going on him at a rapid gate, as fast as he could go?
A. Well, he was going pretty fast.
Q. As fast as he could go?
A. I should say it was as fast as he could go.
Q. Welch had no pistol, did he?
A. I didn't see any.
Q. Did he have a pistol?
A. I could not say.
Q. Did he have a knife?
A. Well, it looks like he had something; I don't know what it was.
Q. He had something in his hands, did he?
A. I could not say whether he had it in his hand, but he had something.
Q. How do you know he had something?
A. It looked though he had something, the way he was going in that direction.
Q. Did you see anything?
A. No, sir.
Q. Did you see a knife?
A. No, sir.
266 Q. Did you see a pistol?
A. No, sir.
Q. Did you see a club?
A. No, sir.
Q. Did you see anything at all in his hand?
A. No, sir.
Q. You don't know whether he had anything in his hand or not?
A. No, sir.

At this point a recess was taken until 1.30 p. m.

AFTERNOON SESSION.

Redirect examination by Mr. THOMAS MARCUM:

Q. Do you know where Mr. Mintor's house was at that time?
A. Yes, sir; it was north of the gate, directly in front of it.
Q. Which side of the street?
A. On the north side.
Q. If a line had been drawn from where Bob Marshal stood—did you see any bullet hole afterwards at any time?
A. Yes, sir.
Q. Where?
A. At the east corner of the house.
Q. About how high from the ground?.
A. Six or eight feet.
Q. If a line had been drawn from where Marshal stood straight to the bullet hole where would the gate be?

A. Right on the line.
(Witness excused.)

267 JOHN VANN, having been duly sworn upon behalf of the defendant, was examined in chief by Thomas Marcum, esq., and testified as follows, to wit:

Question. Is your name John Vann?
Answer. Yes, sir.
Q. Where do you live?
A. I live south of Muskogee in the Creek Nation.
Q. Did you know John Welch in his lifetime?
A. Yes, s'r.
Q. And Robert Marshal?
A. Yes, sir.
Q. Do you know the defendant?
A. Yes, sir.
Q. What tribe of Indians did Marshal belong to?
A. He was a Creek, as far as I know. I knew him when I saw him, was all.
Q. What nation do you belong to?
A. The Creek.
Q. Were you at the fair there last September?
A. Yes, sir.
Q. Did you see the shooting of Johnn Welch?
A. Yes, sir.
Q. Where were you?
A. I was east of Charley's tent.
Q. Had you seen any wagons there about that time?
A. Yes, sir.
Q. Where were they?
A. The wagons were scatt'red all up and down the street there then.
Q. What became of these wagons?
A. They went on the outside of that little ground there where we were.
Q. Did they go out before the shooting commenced or afterwards?
A. Just before the shooting the wagons went out.
Q. How long before?
A. It wasn't long; about a couple of minutes, I guess.
Q. Now, just tell *jur* jury how the shooting took place?

268 A. Well, when I seen the shooting I was standing up there, and when John come out of his tent door and started towards Charley, and Charley turned and went in his, and turned back, and when he turned back I seen whehn Charley shot.

Q. Where was John Welch when you first saw him?
A. He was making from his tent door—making towards Charley.
Q. What was Charley doing then?
A. Charley was going on the inside of his.
Q. How close was Welch to Charley when you next saw Charley? When did you next see Charley after he went into the tent?
A. The next time I saw him he was on the outside, both making for one another.
Q. How long was Charley in the tent?

A. He just went right in and out.
Q. Where was Welch when he came out?
A. Welch had come up pretty near to the door of Charley's tent; come right towards Charley.
Q. How fast was he going?
A. He was going pretty pert.
Q. What did Charley do?
A. Charley shot. I seen when Charley shot.
Q. How many shots did he fire?
A. He fired three times.
Q. Then what?
A. When Charley made the first shot at Welch, Welch was still coming towards him, and the next shot he made Welch was still coming. And just at the last shot Welch turned off from Charley.
Q. Do you know which way he turned?
A. He turned around that way, and went back like he was going towards his tent.
Q. Do you know where he went to?
A. No, sir.
Q. What did Charley do then?
269 A. I don't know what Charley done. I didn't see him any more right then.
Q. What next?
A. Just after that, after the last shot that Charley made, I seen this here man Marshal coming right up behind him, just as the last shot was made.
Q. State what he done, if anything.
A. I seen him when he shot at Charley twice, and I saw him when Charley shot at him and killed him.
Q. Then what?
A. That is all I seen.
Q. And could you see Welch's hands as he was rushing at Charley?
A. No, sir.
Q. Did you notice what he was doing with them?
A. No, sir.
Q. Do you know a white man by the name of Frances Brooks?
A. No, sir.
Q. Did you see any white men there?
A. I didn't notice any.
Q. Did you notice whether or not there was any white people about Welch's tent at that time?
A. No, sir; I never noticed that.
Q. How far were you from Welch's tent?
A. I was about ten or fifteen steps, or feet, I mean.
Q. Which way were you looking when the shooting was going on?
A. I was looking west from where I was standing.
Q. Did you see Welch's tent from where you were?
A. Yes, sir.
Q. You saw no white people there?
A. No, sir.
Q. What direction was Bob Marshal shooting in?
A. He was shooting north.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

270 Q. Bob Marshal's first shot was just as Charley Smith was firing his last shot at John Welch, was it?

A. Yes, sir.

Q. What did Bob say?

A. I never heard him say nothing.

Q. There was quite a noise there and excitement just then, was there?

A. Yes, sir.

Q. You could not have heard him if he had said anything, could you?

A. No, sir; I could not have heard him.

Q. There was a great many people in there, wasn't there.

A. Yes, sir; a good many.

Q. And the place where the first shooting was, it was there t'ere was a good deal of excitement?

A. Yes, sir.

Q. People running in all directions, were they not?

A. Yes, sir.

Q. Women, too?

A. Yes, sir.

Q. You didn't take time to see whether or not there was white men there or not, did you?

A. No, sir; I didn't see any there.

Q. There was a good many people between you and these two men, were there not?

A. No, sir; there wasn't so many.

Q. Was there some?

A. There was some few there.

Q. How far away were you?

A. I was about ten or fifteen feet.

Q. There was other people standing about you there?

A. Yes, sir.

Q. Some others closer than you were?

A. Yes, sir.

Q. Welch was advancing on Smith, and Smith was advancing on Welch?

A. Yes, sir.

Q. Did you see Smith go on and get his pistol?

A. No, sir; I saw him when he went in and got something; I

271 don't know whether it was a pistol or not.

Q. You saw him, then, go in?

A. Yes, sir.

Q. Did he go pretty fast?

A. Yes, sir; he rushed right on.

Q. Did he run?

A. No, sir; he was in a fast walk when I saw him.

Q. When he was going after his pistol what was Welch doing?

A. Welch was following him up.

Q. Welch wasn't going very fast, then, was he?

A. No, sir; nit right at that time.

Q. He was just walking along slowly?

A. Yes, sir.

Q. He wasn't trying to kill Smith, then; wasn't running after him trying to kill him, or anything of that kind?

A. No, sir.

Q. Just walking in that direction—following him in that way?

A. Yes, sir.

Q. Smith went in and then came out with a pistol. Didn't they meet, apparently, suddenly and accidentally there?

A. I don't know.

Q. Didn't each one seem surp'ised when they run up together?

A. No, sir.

Q. They didn't?

A. No, sir.

Q. Did Smith go to shooting at him so soon as he got out?

A. Yes, sir; as soon as he stepped out of the door he shot.

Q. He shot and advanced as he shot, did he?

A. No; he just shot; just about that way [indicating], and then made two last shots.

Q. You take one of these pistols—he could not shoot it as fast as he could a self-cocker, could he?

A. No, sir.

Q. He would have to take up a little time coming down, and take time to draw it down again?

A. Yes, sir.

Q. He was advancing when he commenced shooting, and didn't
272 he just keep advancing? Of course, it was in a very short time, but during that short time wasn't he still advancing right on Welch?

A. Yes, sir.

Q. Wasn't he cursing Welch at the time?

A. I didn't hear him.

Q. Didn't he say, "You damned bulldozer, what have you got to do with it?"

A. I didn't hear it.

Q. You could not have heard it if it had been said, could you?

A. No, sir.

Q. Which shot occurred first, the last shot that Charley Smith fired at Welch or the first shot that Robert Marshal fired?

A. I could not tell you; they were both so near at one time I could not tell.

Q. Well, Marshal came up and took part in the difficulty when Smith was firing at Welch?

A. Yes, sir.

Q. Marshal came up and fired then?

A. Yes, sir; at the last shot.

Q. Robert Marshal's first shot was after Smith's last shot at Welch, was it?

A. Yes, sir.

Q. How much after it?

A. They were pretty near at the same time.

Q. But you think that Marshal's shot was a little after the last shot that Smith fired at Welch?

A. No; I could not say.
Q. You could not tell which was first or last?
A. No, sir.
Q. They were together?
A. Pretty near together.
Q. What did Marshal say? Didn't he tell Smith to hold up?
A. I didn't hear him say hold up, or halt, or nothing.
Q. Why could you not hear him?
273 A. I could not say that. I didn't hear it.
Q. So much noise?
A. There may have been.
Q. Marshal was an officer there?
A. Yes, sir.
Q. Smith knew that, did he not?
A. I suppose so.
Q. Everybody in that country, there, knew it, didn't they?
A. Yes, sir.
Q. Wore his uniform, didn't he, like other United States Indian policemen?
A. Yes, sir.
Q. Have you ever been arrested on any charge?
A. Yes, sir.
Q. What?
A. Whiskey.
Q. What else?
A. A horse case.
Q. Where were you arrested on whiskey?
A. In this court.
Q. What did they do with you?
A. Give me 90 days in the U. S. jail here.
Q. You were arrested once for horse stealing?
A. Yes, sir.
Q. What became of you on that?
A. I came clear before the commissioner.
Q. Have you been arrested for anything else?
A. Not here.
Q. In any court?
A. I was arrested in the Muskogee court once.
Q. What for?
A. Disturbing the peace.
Q. What did they do with you there?
A. I came clear.
Q. Were you ever arrested for anything else?
A. I was arrested at Muskogee for something else, but I don't remember what it is now.
Q. U. S. authorities arrest you?
A. Yes, sir.
Q. What have the Creeks had you for?
A. Nothing.
Q. Can't you think of what that was for, that you spoke of
274 just now?

A. It was for burning a prairie.

Q. For arson, was it?

A. It was my own claim I was setting afire, and they just pulled me for it.

Q. Did you set it afire to burn somebody's house?

A. No, sir; I set it afire to keep some white folks from cutting my hay off.

Redirect examination by Mr. THOMAS MARCUM:

Q. You came clear of everything except the whiskey business?

A. Yes, sir.

Q. How quickly were these three shots fired by Smith at Welch?

A. The first shot was kind of slow, but the last two shots were fast.

Q. Did you see where Welch went to after that?

A. No, sir.

Q. Which direction did he go?

A. He turned off and went back that way towards his tent; was the last time I saw him.

Q. You don't know where he went?

A. No, sir.

Q. Where was he when Marshal fired; where was John Welch when Marshal fired at Smith?

A. When Marshal shot at Smith, Welch turned right off that way the last time I saw him.

Q. The last time you saw him he was going north?

A. Yes, sir.

Q. And that was when Marshal fired at Smith?

A. Yes, sir.

Q. I understood you to say that the last shot of Marshal and Smith's shot was about the same time?

A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. According to that they
275 were both going into a fight, as though they wanted to fight?

A. Yes, sir.

A JUROR. Did Welch have any arms?

A. Not that I saw.

Q. Which side was to you, of Welch?

A. Welch was west of me.

Q. Was his right side or left side to you?

A. Stand'ng right with his face towards me when he was doing the shooting.

Q. Did Welch have a coat on?

A. I could not tell you whether he did or not. I think he did—no, I don't know whether he did or not.

The ASSISTANT DISTRICT ATTORNEY. Don't you know he didn't have a coat on?

A. I could not say; I didn't notice him that close.

Q. Welch's face was to you, and you never saw anything in his hands?

A. Yes, sir.

Q. His hands were down by his side?

A. Yes, sir.

Q. Walking along like a man would walk with his hands?
A. Yes, sir.
(Witness excused.)

276 CHARLES SHEPARD, having been duly sworn upon behalf of the defendant, was examined in chief by Thomas Marcum, esq., and testified as follows, to wit:

Question. Where do you live?
Answer. I live at Webbers Falls when I am at home.
Q. Did you know Bob Marshal in his lifetime?
A. Yes, sir.
Q. Did you know John Welch?
A. Yes, sir.
Q. Do you know the defendant?
A. Yes, sir.
Q. Were you at the fair last September at Muskogee?
A. Yes, sir.
Q. Do you know anything about the shooting of John Welch and Marshal?
A. Yes, sir; I seen it.
Q. Where were you?
A. I was right across the street from where it was at. There was a little street, and I was running a spindle right opposite where the shooting was going on.
Q. What is a spindle?
A. It is a kind of a wheel of fortune.
Q. Did you see any wagons in that tent row there, in that place?
A. Yes, sir; it was filled most off the time, going and coming.
Q. Was there any wagons in there at the time of the shooting, or not?
A. No, sir.
Q. How long had they been out?
A. They had just went out.
Q. Did you see Charley Smith just before the shooting?
A. Yes, sir.
Q. Where was he?
A. He was with these wagons, going out towards the gate.
Q. What became of Charley then?
277 A. He went out towards the gate where these wagons were all together at, and then he came back up to where a stand was there right across fro' where I was at.
Q. Now, tell about the difficulty.
A. He came back up to his stand; he was going in his place there, and he came right by Welch, and he had a stand there, too, right by, up above Charley's; and as he came by Welch's stand Welch was standing there in his stand, and he came out about the time that Charley got by, and I noticed Charley look back and said something. They were talking to each other, and Charley was still going and Welch was still coming right along behind him, and Charley went up to his stand there and started in there and Welch was right after him, and directly he turned and Welch was on him again, and he had a pistol this time and shot.
Q. How fast was Welch going after Charley?

A. He was going pretty fast.

Q. How fast did Charley go from him to the tent?

A. They were both going just as fast as they could go without running.

Q. How long was Smith gone from the time he entered the tent until he returned out of the door?

A. It just looked like he went right into the tent and turned around and came right out.

Q. When the shooting commenced?

A. Yes, sir; as he stepped out of his tent.

Q. How far was Welch from him?

A. He wasn't over two steps, it didn't look like—two or three.

Q. What did Charley do then?

A. He fired that way, and then he kind of stepped back this way, sorter, and Welch kept going after him, and he shot again, and Welch
278 turned then and come across the street, just as he turned and shot again, and then Welch staggered off across the street right over by where I was at.

Q. What was Charlie doing then?

A. He was standing there looking at him as he was going across the street. He had the pistol in his hand and he and Marshal was as far as from here to the back end of the court room, and he roode up on his horse and fired at Charley, and I seen the dirt fly up close to his feet, right down beside him, and he turned then and shot at Welch.

The ASSISTANT DISTRICT ATTORNEY. Smith turned and shot at Welch?

The WITNESS. Sir?

Mr. MARCUM (of counsel for defendant). What occurred there then?

A. They were just running around there every way——

Q. What did Smith do when this shot fired from Marshal?

A. He turned right around, sort of threw up his arm that way, and shot, all at the same time.

Q. How many shots did Marshal fire?

A. He fired two shots.

Q. Now, how near together was the last shot of Marshal and Smith's shot at him?

A. There wasn't a second's difference between them?

Q. What became of Marshal?

A. He fell off his horse, and that is the last I saw him then. I saw him after he was dead.

Q. What direction was Marshal shooting?

A. He was shooting kind of north then. The street run this way, and he was shooting right down the street towards Charley.

Q. How, with reference to the front gate, was Marshal shooting?

A. He was shooting right towards the front gate.

Q. Did you see anybody about Welch's tent at that time during this shooting?

279 A. Everybody was about gone at that time. What wasn't gone was going pretty fast.

Q. Did you see any white men there?

A. No, sir.

Q. What did you have there at your place?

A. I had a spindle with money on it.
Q. How much money?
A. I had over $100.00 on the spindle at the time.
Q. How rapidly were these shots at Smith of Welch fired?
A. As fast as you could could cock a pistol and shoot it.
Q. How long did the whole shooting occupy?
A. I wouldn't think it was over two minutes in the whole time.
Q. Did you know any of the men that drove the wagons out just before this?
A. No, sir.
Q. There had been no difficulty as far as you know between Smith and Welch just before this shooting?
A. No, sir; I never noticed anything at all, only the whole street was full of wagons.
Q. Is this the first and only difficulty you saw there between Smith and Welch?
A. Yes, sir.
Q. You say Smith had been to the front gate and was going back south?
A. He had been down that way and was coming. I do not know where he had been.
Q. He was returning south towards his tent?
A. Yes, sir.
Q. How far was his tent from Welch's tent?
A. They were not far apart.
Q. I mean the tents; not the do'rs.
A. About as far as from here to you, I reckon. They were all in a row, and I think there was one possibly between him and Welch.
Q. Did you see what position Welch was in as he was crowding on to Charley?
280 A. He was just a going, and he looked to me like he was going up to take hold of him.
Q. Did you notice his hands?
A. I noticed his left hand. He kind of swung it as he walked along.
Q. Did you notice his right hand?
A. No, sir.
Q. Did you see him with any weapons?
A. No, sir; I never saw him with anything.
Q. Do you know whether he had a weapon or not?
A. No, sir.
Q. Did you see any women there at that time?
A. Not until after the shooting was all over with and Charley was gone.
Q. State whether or not you saw any boxes sitting around there or not.
A. There was one box right over on the side I was on, and in front of a dance hall. One box right side of the door.
Q. Now tell the jury whether there was any women there or not.
A. I never seen any women at all.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Welch was in his shirt sleeves, was he not?
A. Yes, sir.
Q. Did you see Welch and Smith when they were first quarreling?

A. No, sir.
Q. When they first had some words?
A. No, sir.
Q. Was Smith's tent north or south of Welch's tent?
A. It was south of it.
Q. You were over on the east side?
A. Yes, sir.
Q. You had a gambling outfit there?
A. Yes, sir; I was running a spindle.
281 Q. You run a gambling outfit all over that territory last summer, didn't you?
A. I was at Flint—at three places.
Q. How many people did you help rob?
A. I never helped rob anybody.
Q. You were one of the robbers in that case the other day from Southwest City, wasn't you?
A. No, sir.
Q. You were one of the witnesses, were you not?
A. Yes, sir.
Q. You were one of the witnesses that was up there and helped to run that gambling scheme or outfit, were you not?
A. No, sir; I had nothing to do with it at all.
Q. You were running a gambling game of your own?
A. Yes, sir; I run that spindle.
Q. Were you ever arrested for anything?
A. For whiskey.
Q. Where?
A. In this court.
Q. What was done with you?
A. I plead guilty and got 35 days.
Q. When was that?
A. It has been several years ago. It has been about two years the last time I was here.
Q. Were you here before that?
A. I was here twice for whiskey.
Q. What did you get the last time?
A. Fifty days in jail.
Q. Raised you a little on that?
A. Yes, sir.
Q. What else have you been arrested for?
A. That is all I ever was arrested for. I was brought here and put on a peace bond once.
Q. Were you ever arrested for anything else?
A. No, sir.
Q. In any court?
A. No, sir.
Q. Were you at Flint court-house at the payment there?
A. Yes, sir.
Q. Were you a partner of these fellows that robbed a man there,
289 and were sent to the penitentiary from this court?
A. No, sir.

Q. You were at all the payments, were you not?
A. Yes, sir.
Q. Running a g'mbling establishment at all of them?
A. No, sir; I run a g'mbling house at the th'ee last payments.
Q. What were you doing at the others?
A. I was working for an outfit.
Q. What sort of an outfit?
A. I run a wheel of fortune.
Q. You know that is gambling just the same as the other?
A. It wasn't mine. I was just working for wages.
Q. You were running a gambling outfit every payment, then?
A. No, sir; I run a lemonade stand at Gibson.
Q. What did Charley Smith say to Welch?
A. I never heard him sa' anything.
Q. He didn't say a word, did he?
A. They were speaking—him and Welch both—as he came past the tent. They had some words.
Q. That is when Smith came up towards Welch's tent, by it?
A. Yes, sir.
Q. Was Smith coming from the north?
A. Yes, sir.
Q. And going along by Welch's tent?
A. Yes, sir.
Q. And there they had some words with each other?
A. Well, he never stopped.
Q. Smith never stopped?
A. No, sir; but they were talking there; just kind of looked back, and Welch said something to him; and he kind of looked back and spoke something.
Q. Didn't Charley Smith say "Do you take it up?"
A. I never heard him say it.
Q. You didn't understand anything that they said, then?
A. No, sir.
290 Q. Smith went right on by and Welch followed, did he?
A. Yes, sir.
Q. How far did Smith go before he got the pistol?
A. It was about 20 steps, I think.
Q. Do you know whose pistol it was he got?
A. Yes, sir.
Q. Whose?
A. Scott Gentry's.
Q. Did you see him get the pistol?
A. No, sir.
Q. You don't know how he got it, then?
A. No, sir.
Q. He got it on the inside of the tent?
A. Yes, sir.
Q. Was it Smith's tent?
A. Yes, sir.
Q. You are sure of that, are you?
A. I am not sure it was his tent; I could not say for certain.

Q. Wasn't it the next tent to his tent?
A. I don't know where he got the pistol at all.
Q. You saw him go into the tent and get a pistol, didn't you?
A. Yes, sir.
Q. Wasn't it the next tent south from Smith's tent?
A. No, sir; I don't think it was.
Q. You think it was Smith's tent?
A. Yes, sir.
Q. When he went and come out with the pistol, how far was he from Welch?
A. Welch was right about three steps from him.
Q. Did Smith say anything then?
A. I never noticed him say anything.
Q. He fired right at once, did he?
A. Yes, sir. Well, I didn't understand anything——
Q. I am talking about the firing. He fired right at once, did he?
A. Yes, sir.
Q. And you stated awhile ago the first shot was fired at once?
A. Yes, sir.
291 Q. And the others were fired as fast as he could cock the pistol and fire?
A. Yes, sir.
Q. You never heard Smith tell Welch that if he came any further he would shoot him, or anything of the kind?
A. No, sir.
Q. Or to stand back or he would shoot him?
A. No, sir.
Q. You saw Welch with no arms of any kind in the world, did you?
A. No, sir; I never seen any.
Q. If he had had a pistol you could have seen it, could you not?
A. Yes, sir; I believe I could. I don't know, though. I never seen any. His right hand was from me.
Q. If he had been carrying a pistol swinging out along there you could have seen it?
A. If he had been swinging it along there I could have seen it.
Q. You could have seen it if it had been down by his side when he turned and came in?
A. Yes, sir; after he turned.
Q. You didn't see it, did you?
A. No, sir.
Q. It wasn't there, was it?
A. I never seen it.
Q. You could have seen it if it was there, could you not?
A. Yes, sir; I think I could.
Q. You didn't see it, did you?
A. No, sir.
Q. How far had Welch gone from the place where he and Smith had the first words up to the time of shooting?
A. Well, he went from his tent——
Q. About how far was it?
A. It was about 15 feet, 15 or 20 steps.

Q. When Marshal came up, didn't Marshal tell Smith not to shoot any more, to stop that shooting?

A. No, sir.

Q. Did Marshal say anything?

A. He never said a word that I heard.

293 Q. You could not have heard it if he said anything, could you?

A. No; I don't guess I could.

Q. Because there was a great deal of confusion there?

A. Yes, sir.

Q. You don't know what Marshal said?

A. No, sir.

Q. You don't know whether Smit said anything to Marshal or not?

A. No, sir.

Q. Are you still running your wheel of fortune?

A. No, sir.

Q. How long have you quit it?

A. I quit it since the payment.

Redirect examination by Mr. THOMAS MARCUM:

Q. Where do your father and mother live?

A. They live at Webbers Falls, where I do. They are dead, though, now. My father has been dead for five years.

Q. Are you a Cherokee?

A. Yes, sir.

Q. There is no law in your nation against gambling?

A. No, sir.

Q. You got permission to run the wheel from whom?

A. I did not get it from anyone. I just set up there.

Q. They just permitted you to runn it?

A. Yes, sir.

Q. You stated to the assistant district attorney a minute ago that when Welch turned around you didn't see any pistol. Could you have seen before he turned around whether he had one or not?

A. No, sir; I could not. I seen his left hand.

Q. Where was his right hand as he went towards Smith?

A. His right hand was west of me.

Q. And his left side was to you, and his right hand was from you?

A. Yes, sir.

294 Q. How was he holding his right arm?

A. He had his right arm down by his side?

Q. He didn't have it swinging that way [indicating]?

A. I never saw his right arm at all.

Q. Did he swing his left?

A. Yes, sir; he was swinging his left hand.

A JUROR. Could you have seen whether he had a pistol or not if you had been right in front of him?

A. Yes, sir; I could have seen it.

Q. Was Mr. Smith in front of you?

A. No; Smith was facing me. He was kind of facing me.

The COURT. Then he wasn't in front of the other man?

A. He was in front of him, but he didn't have his face just exactly to him.

Q. Was his front to you when he shot?

A. He was in just about this shape [indicating] and I was over here.

Q. He was looking towards you?

A. He wasn't looking at me; no, sir; but his side or front was kind of towards me a little.

Mr. THOMAS MARCUM (of counsel for defendant). Before Welch turned around could you see his right hand, what it held?

A. No, sir.

Q. Could you tell what Charley could see?

A. No, sir; I could not tel' what he saw.

Q. You could not tell whether he could see his right hand or not?

A. No, sir.

Q. Then you don't know what he had in his right hand, nor could you tell before he turned around, nor could Smith, as far as you know?

A. No, sir.

295 A JUROR. Did Welch fire any shots there?

A. No, sir.

(Witness excused.)

296 The ASSISTANT DISTRICT ATTORNEY. If the court please, a witness, Mr. Woods, of Van Buren, that I had summoned, is now here, and I would like to offer him at this time, for the reason that he wants to get away. I would have offered him before closing, but he properly comes in rebuttal, still I would like to offer him now and let him go.

Mr. C. J. FREDERICK (of counsel for defendant). We have no objection.

The COURT. Call him, then.

JIM WOOD, having been duly sworn upon behalf of the Government, was called in rebuttal, and examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. You live at Van Buren?

Answer. Yes, sir.

Q. What is your business?

A. I am a commercial man, travelling salesman for the Shibley-Wood Grocery Co., of Van Buren.

Q. Were you in Muskogee, out by the fair grounds, the day of the shooting or killing there last September?

A. I was.

Q. I wish you would in your own way just tell what you saw there. If you can not give any names just go ahead and describe where you were, and what you saw as near as you can. In the first place I will ask you where you were when you heard the first shot?

A. I was trying to get out of this Midway Plaasance, I believe they call it there——

Q. That is, the tent street where the tents were on either side?

A. Yes, sir; and there was a colored man with me. I just
297 remarked to him, I says, "I expect we had better get out of here." He says, "Why?" I says, "There is going to be trouble." He says, "Why do you think so?" and I says, "I see these marshals in here."

They seemed to be a little bit rough anyway, and I says, "This is not the place for me anyway, and I think we had better move." He says, "All right." We started to get out of the place. We had gone probably 20 steps, I guess, after I made this remark, and I heard a shot, and I says, "I told you this thing was going to happen," and we tried to get out, but could not, the crowd was so thick. And pretty soon I heard another shot, and I turned my head, and I saw a man turn with his side to me. It seems he was shot in the neck. The blood was running down, or looked to me that way, and I just remarked to this fellow, "My goodness, look how that man is shot."

Q. What was the color of this man that was shot?

A. A black man. A large man. He says, "That is terrible." And this man that was shot turned his back to the party that was doing the shooting. I didn't know any of these parties. And he started off from him.

Q. That is, the man that was shot turned off?

A. Yes, sir; the man that was doing the shooting, he shot him afterwards I do not know how many times. I could not testify as to that. But this man went across the street.

Q. When he got across the street what did he do?

A. He fell in the entrance of a stand there which was used as a dance hall, I believe, or something of that kind. After that time I heard a man say, "Get out of here, get out of here," and I looked in the direction I heard these things, and I saw a man coming on horseback,
298 and we got out of the way, and he passed me and had gone probably 20 steps, I guess, and there was a man stepped out from the entrance to this place, and there was another shot fired, and this man came up with his pistol, and I just took this fellow that was with me, and we walked out to the entrance, and got into a carriage and went to the city.

Q. The first shot that was fired you were not looking at the parties.

A. No, sir; I wasn't looking at the parties.

Q. Were you looking at them when the second shot was fired?

A. Well, now, as to that I could not testify. I saw shots fired, but as to the number I could not testify.

Q. Was it before or after the second shot that you saw the black man that was shot in the neck?

A. It was after the first shot that I heard.

Q. Was it after the second?

A. I could not testify as to that.

Q. That man that was shot in the neck that way turned and walked away from the man that was shooting at him?

A. Yes, sir.

Q. And the man continued shooting at him as he was walking away from him?

A. Yes, sir.

Cross-examination by Mr. C. J. FREDERICK.

Q. You represent the Shibley-Wood Grocery Co.?

A. Yes, sir.

Q. You were not trying to sell goods down there in these tents?

A. No, sir.

Q. What were you doing down there among these tents?

A. I was attending the fair, and I had a few hours spare time——
299 The ASSISTANT DISTRICT ATTORNEY. That was a sort of a Midway Plaisance?
The WITNESS. Yes, sir; it was a sort of an amusement to me.
Mr. C. J. FREDERICK (of counsel for defendant). The fair was not down there where these tents were.
A. No, sir; I had been to the races——
Q. What time of day did this occur?
A. As to that I could not testify.
Q. Before or after noon?
A. It was about noon some time.
Q. Were you acquainted with anybody down there?
A. No, sir; only I was acquainted with this colored man that was with me, and I had met Mr. Scott from Muskogee at the ground, and I was acquainted with him.
Q. I mean down in the row of tents.
A. I knew a colored man there by the name of Evans. He is a musician. Jim Evans.
Q. You told the man who was with you that you thought there was going to be some trouble there?
A. Yes, sir.
Q. Were you going out of the front gate?
A. We were going—I don't know whether you would call it the front gate or not.
Q. It opens out on that street that leads out to town?
A. Yes, sir.
Q. You were going out towards the gate that goes into that street?
A. Yes, sir.
Q. That gate is on the street, is it not?
A. It is between the fair ground and the town?
Q. Had you got to the gate before you heard the shot fired?
A. No, sir,
Q. How near had you got to the gate?
300 A. I guess we were probably 40 steps.
Q. Where was the shooting? Between you and the gate?
A. The first shooting was between me and the other end of this street.
Q. The shooting was in your rear as you walked to the gate?
A. Yes, sir; the first.
Q. The first shot that attracted your attention occurred behind you?
A. Yes, sir.
Q. It wasn't but about a second before another shot was fired?
A. I don't know; it was over——
Q. And then another one. How many shots were fired there?
A. I could not say as to that. I judge about half a dozen. I could not get out of the way; I had to stop. I tried to get out.
Q. Why could you not get out of the way?
A. The crowd was so thick.
Q. The crowd right in ahead of you?
A. They were all around.
Q. There was people behind you, of course, too?
A. Yes, sir.

Q. Did you turn around and look toward the south and witness this transaction?

A. When I looked around I thought they were shooting in my direction and I had better move a little bit.

Q. You had no friend there particularly that was liable to be shot?

A. Nothing, only this colored man.

Q. And you had him with you?

A. Yes, sir; and I thought it was best to *b*et away from there.

Q. You heard one shot. Had you looked around before the next shot was fired?

A. I saw the crowd was trying to get away. Everybody seemed to be feeling like I was, that there was somethiog wrong there, or something of that kind.

301 Q. Did you turn and look before another shot was fired?

A. I looked in the direction just as soon as I heard the shot fired.

Q. Did you turn your whole body, or just your head?

A. As to that I could not say.

Q. You still kept moving on towards the gate, as well as you could, didn't you?

A. Yes, sir; I wanted to go home.

Q. How far were you from these people that were shooting?

A. I could not say exactly.

Q. Well, approximately, about how far? What distance would you estimate it? Would it be 20 steps?

A. I guess it was probably about 15 steps when I saw this——

Q. How far were you when the last shot was fired?

A. I was about 15 steps from the man that I saw that was shot—seemed to be in the neck. When he turned his back and started across this street I was in about 15 steps of him.

Q. When you turned your head you didn't stop, did you?

A. No, sir; I went to the mouth or to the entrance of a tent there, and the tent was full of people, and I saw there was no chance for a man to protect himself there, and I just remarked to these folks that were on the inside—there was a small cook stove there—I said, "Get behind that stove," and they got behind the stove, or tried to.

Q. The shooting was all over by that time, though?

A. Well, I don't remember whether there was a shot fired after that or not.

Q. Were there many people between you and where this man was shooting at the other man?

A. There was when the first shot was fired.

302 Q. Were there people between you and he when the second was fired?

A. No, sir.

Q. The street was clear?

A. They were all running away.

Q. When you saw the man walking across the street—we will call it a street, between the tent rows—you noticed he was bleeding, you say?

A. Yes, sir.

Q. There was no firing after that time, was there?

A. No, sir.

Q. Not at him. You know about three shots being fired after that?

A. After this man turned, and I remarked to this friend of mine about how he was shot, I heard the report of a pistol again, and I saw the smoke, and I saw the dust fly, seemed to be, about the middle of the man's back, when he was going across this street, and I says to this fellow, "We had better move."

Q. Wasn't the dust you saw dust that flew out of the ground?

A. No, sir; come out of his clothes. I don't know what caused it.

Q. What kind of clothes did he have on?

A. I could not tell you that.

Q. Did he have on a coat?

A. No, sir.

Q. Just a short?

A. I believe he had on a vest.

Q. Did you see the other man shoot from horseback?

A. I never saw a man shoot from horseback; no, sir. I saw a man shoot at a man on horseback.

Q. But you didn't see the man on horseback shoot?

A. No, sir.

Q. If that man on horseback shot twice, you were where you could not see it? Where were you that you could not see it?

303 A. I didn't see anyone shoot from on horseback.

Q. Were there two guns fired from a man on horseback there?

A. I don't know as to that; I could not say.

Q. Did you see a man on horseback there?

A. Yes, sir.

Q. In the tent row, there?

A. Yes, sir; he came right by me and started out this main entrance.

Q. I don't mean after the shooting was over.

A. The last shot that I heard fired was the shot that knocked this man off his horse.

Q. Did you see him fall off his horse?

A. Yes, sir; he was a colored man.

Q. You didn't see the man that fell off his horse fire any shots?

A. No, sir.

Q. If he had fired a shot, could you have seen him?

A. I could, if he had fired in my territory there. I was watching him very closely.

Q. I mean, just immediately before he got off his horse, if he had fired could you have seen him?

A. Yes, sir; I could have seen him. I didn't see him fire any shots.

Q. But you did see him fall off his horse?

A. Yes, sir.

Q. If that man had fired two shots——

The ASSISTANT DISTRICT ATTORNEY. He does not understand you.

Mr. C. J. FREDERICK (of counsel for defendant.) I am talking about the man that fell off his horse. (To the witness.) Where did the man fall off?

A. At the entrance.

Q. At the gate?

A. Yes, sir; he was shot by a white man, I took him to be.

The ASSISTANT DISTRICT ATTORNEY. That was the man that
304 was shot in the arm?

A. Yes, sir.

Mr. C. J. FREDERICK (of counsel for defendant). Now, then, just immediately after you saw the man come across the street—that blood coming out of him—did you see a man ride up and shoot from his horse, from the south, back that way?

A. No, sir.

Q. Did you see any man shoot at another, on horseback?

A. The only two men I saw do any shooting were both on foot, and one was a white man and the other was a colored man.

Q. That was up at the gate?

A. One was at the gate and the other wasn't. One was between me and the main party.

Q. That occurred several minutes after the first shooting. Did you see the man fall?

A. Yes, sir.

Q. Now, immediately after you saw the man going across the street with the blood on him, did you see another man on horseback south of him shooting a pistol?

A. No, sir; I never.

Q. Did you see any man on horseback there at all?

A. I saw one man on horseback. He was the man that was going up the main street there.

Q. I want to keep you off that main street there. Did you see any man down this way, south, on horseback? Did you hear any other shooting after you saw the man go across the street bloody?

A. I did not; no, sir. I didn't see any shooting only by these two parties that were on the ground.

Q. If there had been three more shots fired immediately after you saw the man walk across the street, could you have heard them; that is, right there near that place?

A. Yes, sir.

Q. You didn't hear them. Now, you saw a man shoot at another,
305 and saw the man with the blood on him?

A. Yes, sir.

Q. Did you see the man that shot at that man shoot at anybody else?

A. No, sir.

Q. How often had you been in there? These tents are in an enclosed lot by the side of the fair ground?

A. I don't know whether you would call it enclosed or not. There is a barb wire fence on one side.

Q That encloses it pretty well. It keeps out stock. There was a row of tents there, and a pass way between, and the entrance would be at the gate opening out on the main street that leads from town to the fair grounds.

A. Yes, sir.

Q. You were down inside between these tents, were you?

A. Yes, sir.

A. No, sir.

Q. Not at him. You know about three shots being fired after that?

A. After this man turned, and I remarked to this friend of mine about how he was shot, I heard the report of a pistol again, and I saw the smoke, and I saw the dust fly, seemed to be, about the middle of the man's back, when he was going across this street, and I says to this fellow, "We had better move."

Q. Wasn't the dust you saw dust that flew out of the ground?

A. No, sir; come out of his clothes. I don't know what caused it.

Q. What kind of clothes did he have on?

A. I could not tell you that.

Q. Did he have on a coat?

A. No, sir.

Q. Just a short?

A. I believe he had on a vest.

Q. Did you see the other man shoot from horseback?

A. I never saw a man shoot from horseback; no, sir. I saw a man shoot at a man on horseback.

Q. But you didn't see the man on horseback shoot?

A. No, sir.

Q. If that man on horseback shot twice, you were where you could not see it? Where were you that you could not see it?

303 A. I didn't see anyone shoot from on horseback.

Q. Were there two guns fired from a man on horseback there?

A. I don't know as to that; I could not say.

Q. Did you see a man on horseback there?

A. Yes, sir.

Q. In the tent row, there?

A. Yes, sir; he came right by me and started out this main entrance.

Q. I don't mean after the shooting was over.

A. The last shot that I heard fired was the shot that knocked this man off his horse.

Q. Did you see him fall off his horse?

A. Yes, sir; he was a colored man.

Q. You didn't see the man that fell off his horse fire any shots?

A. No, sir.

Q. If he had fired a shot, could you have seen him?

A. I could, if he had fired in my territory there. I was watching him very closely.

Q. I mean, just immediately before he got off his horse, if he had fired could you have seen him?

A. Yes, sir; I could have seen him. I didn't see him fire any shots.

Q. But you did see him fall off his horse?

A. Yes, sir.

Q. If that man had fired two shots——

The ASSISTANT DISTRICT ATTORNEY. He does not understand you.

Mr. C. J. FREDERICK (of counsel for defendant.) I am talking about the man that fell off his horse. (To the witness.) Where did the man fall off?

A. At the entrance.

Q. At the gate?

A. Yes, sir; he was shot by a white man, I took him to be.

The ASSISTANT DISTRICT ATTORNEY. That was the man that
304 was shot in the arm?

A. Yes, sir.

Mr. C. J. FREDERICK (of counsel for defendant). Now, then, just immediately after you saw the man come across the street—that blood coming out of him—did you see a man ride up and shoot from his horse, from the south, back that way?

A. No, sir.

Q. Did you see any man shoot at another, on horseback?

A. The only two men I saw do any shooting were both on foot, and one was a white man and the other was a colored man.

Q. That was up at the gate?

A. One was at the gate and the other wasn't. One was between me and the main party.

Q. That occurred several minutes after the first shooting. Did you see the man fall?

A. Yes, sir.

Q. Now, immediately after you saw the man going across the street with the blood on him, did you see another man on horseback south of him shooting a pistol?

A. No, sir; I never.

Q. Did you see any man on horseback there at all?

A. I saw one man on horseback. He was the man that was going up the main street there.

Q. I want to keep you off that main street there. Did you see any man down this way, south, on horseback? Did you hear any other shooting after you saw the man go across the street bloody?

A. I did not; no, sir. I didn't see any shooting only by these two parties that were on the ground.

Q. If there had been three more shots fired immediately after you saw the man walk across the street, could you have heard them; that is, right there near that place?

A. Yes, sir.

Q. You didn't hear them. Now, you saw a man shoot at another,
305 and saw the man with the blood on him?

A. Yes, sir.

Q. Did you see the man that shot at that man shoot at anybody else?

A. No, sir.

Q. How often had you been in there? These tents are in an enclosed lot by the side of the fair ground?

A. I don't know whether you would call it enclosed or not. There is a barb wire fence on one side.

Q That encloses it pretty well. It keeps out stock. There was a row of tents there, and a pass way between, and the entrance would be at the gate opening out on the main street that leads from town to the fair grounds.

A. Yes, sir.

Q. You were down inside between these tents, were you?

A. Yes, sir.

Q. How many tents between you and the gate at the time you heard this shooting?

A. I could not tell.

Q. Two or three or one?

A. I could not tell you.

Q. How many tents were between where you went and told the people to get behind the stove and the gate?

A. I could not tell you that.

Q. Two or three?

A. I could not tell you the number. I did not pay any attention to it.

Q. The man whom you saw going across the street, and the man who was shot, how far south of you was he?

A. I judge to be fifteen steps from him when the shooting occurred.

Q. Did you see him go in any tent or any place?

A. No, sir; I saw him crossing the street in a northeasterly direction to this dance platform, or whatever it was.

306 Q. Now then, were you still some 15 steps north of that towards the gate?

A. I was north of the man that was doing the shooting.

Q. Up from the bloody man towards the gate?

A. Yes, sir; on the same side of the street the man was on that was doing the shooting.

Q. Where was the man that did the shooting at the time you saw this man going across the street?

A. He was on the same side of the street I was. I was on the west side.

Q. Were there any persons between you and the man who did the shooting?

A. There was when I heard the first shot.

Q. After that?

A. No, sir; there was an open space.

Q. Plain view, then?

A. Yes, sir.

Q. Then, if that man had shot any other persons immediately when you saw the man walking across the street you could have seen him, could you not?

A. I could have seen the man, but I could not tell who he was shooting at.

Q. You could tell there was a man shooting?

A. Yes, sir.

Q. Did the man who did the first shooting also shoot another way?

A. I could not say.

Q. In a southeasterly direction?

A. I could not tell where he was shooting. All I could do was to see the dust fly out of this man's clothes, and I remarked to this man about this man being shot that way. I could not tell who did the shooting. I could see this man——

Q. The man was walking in a northeasterly direction, and going across the street, and you were off to his left about 15 steps away?

A. Yes, sir.

Q. The street is a narrow street between these tents, is it not?

307 Not wider than from here to the wall back there, or the windows, is it?

A. Well, it may be a little wider than that. I judge it to be about that.

Q. Some 20 or 30 feet?

A. Yes, sir.

Q. If you were 15 yards away, then you would be almost north of the man; very little angling?

A. I was very near north of the man that was doing the shooting, to the best of my knowledge, guessing at the direction.

Q. That was up in the direction towards the gate?

A. Yes, sir.

Q. The man was going in a northeasterly direction, going with his side to you?

A. Yes, sir.

Q. You were considerably excited, were you not?

A. Well, yes; about like a man would naturally be. I wanted to get away from there.

Q. You went up in town, sold a good bill of goods, and went home, I reckon?

A. No, sir; I went over in town and caught the first train out.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. You have already described the man that you saw fall off his horse as the man that was shot in the arm. Now, you did not see an officer fall off of a horse?

A. No, sir; I saw a colored man fall off of a horse. I don't know whether he was an officer or who he was.

Q. But before that you didn't see any man fall off of a horse?

A. No, sir.

308 The COURT. What was it lead you to believe there was going to shooting there?

The WITNESS. There was a man drove in there; he had a wagon, and seemed it was a huckster wagon, or something of the kind, and the streets were blocked, and they were having trouble about getting this right-of-way open, and this marshal tried to get them to open up there, and they seemed to be in no good humor, any of them, and I just thought they might have trouble, and I did not want to be in there. That was all. I just remarked to this man that was with me, I guess we had better get out of here.

Recross-examination by Mr. C. J. FREDERICK:

Q. There was several persons who didn't seem to be in good humor?

A. Yes, sir; the man that was driving this team was out of humor.

Q. And you heard others out of humor talking, too?

A. I saw one man dressed in blue clothes; he was on a horse; he seemed to be a marshal; I didn't know him; and he rode up there, and when he rode up there I saw him go towards the gate.

Q. That was before the shooting?

A. Yes, sir.

Q. He seemed to be out of humor, too, did he?

Q. How many tents between you and the gate at the time you heard this shooting?

A. I could not tell.

Q. Two or three or one?

A. I could not tell you.

Q. How many tents were between where you went and told the people to get behind the stove and the gate?

A. I could not tell you that.

Q. Two or three?

A. I could not tell you the number. I did not pay any attention to it.

Q. The man whom you saw going across the street, and the man who was shot, how far south of you was he?

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A. No, sir; I saw him crossing the street in a northeasterly direction to this dance platform, or whatever it was.

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A. I was north of the man that was doing the shooting.

Q. Up from the bloody man towards the gate?

A. Yes, sir; on the same side of the street the man was on that was doing the shooting.

Q. Where was the man that did the shooting at the time you saw this man going across the street?

A. He was on the same side of the street I was. I was on the west side.

Q. Were there any persons between you and the man who did the shooting?

A. There was when I heard the first shot.

Q. After that?

A. No, sir; there was an open space.

Q. Plain view, then?

A. Yes, sir.

Q. Then, if that man had shot any other persons immediately when you saw the man walking across the street you could have seen him, could you not?

A. I could have seen the man, but I could not tell who he was shooting at.

Q. You could tell there was a man shooting?

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Q. The man was going in a northeasterly direction, going with his side to you?

A. Yes, sir.

Q. You were considerably excited, were you not?

A. Well, yes; about like a man would naturally be. I wanted to get away from there.

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A. No, sir; I went over in town and caught the first train out.

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A. No, sir; I saw a colored man fall off of a horse. I don't know whether he was an officer or who he was.

Q. But before that you didn't see any man fall off of a horse?

A. No, sir.

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Q. There was several persons who didn't seem to be in good humor?

A. Yes, sir; the man that was driving this team was out of humor.

Q. And you heard others out of humor talking, too?

A. I saw one man dressed in blue clothes; he was on a horse; he seemed to be a marshal; I didn't know him; and he rode up there, and when he rode up there I saw him go towards the gate.

Q. That was before the shooting?

A. Yes, sir.

Q. He seemed to be out of humor, too, did he?

A. Well, I didn't—I could not say that he was out of humor. I could not tell anything about that. He might have been out of humor in any event. I could not say as to that. I saw him ride up there.

Q. At any rate, things didn't look tranquil and serene?

A. No, sir; they didn't look as agreeable as they might.

309 Q. Was that marshal you saw, with blue clothes on, a white man or a black man?

A. He was a black man.

Q. Which way did he go?

A. He was riding towards the south end of this street when I saw him.

(Witness excused.)

310 Whereupon the defendant continued the introduction of his testimony, as follows, to wit:

ROSWELL MACKEY, having been duly sworn upon behalf of the defendant, was examined in chief by Thomas Marcum, esq., and testified as follows, to wit:

Question. Where do you live?

Answer. Muskogee.

Q. Are you a member of the Creek tribe?

A. No, sir.

Q. Are you a member of any nation?

A. Yes, sir; of the Cherokee Nation.

Q. Did you know John Welch in his life time?

A. Yes, sir.

Q. Did you know Bob Marshal?

A. Yes, sir.

Q. Do you know the defendant?

A. Yes, sir.

Q. Were you at the fair at Muskogee last September?

A. Yes, sir; I was there.

Q. Did you see the shooting of John Welch?

A. I saw some of it.

Q. Where were you?

A. I was right across the street from them, maybe as far as from here to that wall, or mighty near it. I was just across the street over on the other side to the wheel of fortune.

Q. How far were you from Charley Smith's tent? I mean his boarding house?

A. Well, I could not tell you exactly. I was about as far as from here across to that wall. It was just across the street from where I was.

Q. Do you know where John Welch's tent was at that time?

311 A. No, sir; not exactly. I think his was right joining close to Charley's. I think it was. I don't know for certain.

Q. Do you know where Charley Smith's dance hall was?

A. No, sir; I don't believe I did.

Q. What was the first that you saw about th's shooting? Just describe it to the jury.

A. Well, I was over there bucking at the wheel of fortune, and I wasn't paying any attention, and finally a pistol fired behind me, and I

jumped around and looked, and it shot again, and it shot again, and about that time ——

Q. Who was shooting?

A. Charley was shooting then.

Q. Who was he shooting at?

A. Shooting at John, I guess.

Q. Where was John?

A. John was right there.

Q. What was he doing?

A. He was going on to him until he shot the second time. I never seen the first shot, now, but when I saw him he was still going on.

The ASSISTANT DISTRICT ATTORNEY. Who was still going on?

A. John going to him. And Charley shot again, and John kind of whirled around, and Charley stopped shooting, and stood there a little while, and I heard another noise that was still back south of them, and I raised my head and looked again, and Robert Marshal was just coming down with his pistol that way and his pistol went off and the ball struck by Charley's leg, and Charley jumped around and looked around and finally Robert's horse, when he shot it, kind of whirled his head back south and he pulled him off and got him back around again, and about that time Charley was as close as that man there to me, and Robert was fixing to shoot again, and I dashed under the counter and both the pistols went off mighty near together.

Q. What direction was Marshal from Smith at that time?

312 A. I would call it south, the way that street was. It was down there close to the merry-go-around.

Q. How many times did Smith shoot at Welch?

A. He shot three times, I believe. I guess he shot that much. I don't know whether he shot when that first shot was made or not, but when I looked he shot once more and he shot again, and that made twice that I know that I seen then.

Q. What was Welch doing when he fired the third shot at him?

A. When the third shot was shot, John whirled then.

Q. Now, state to the jury whether Smith fired any more after that.

A. No, sir; he never shot any other shot at John.

Q. In what direction did John go then?

A. I don't know which way he went. He was going kind of crossways of that street. When Robert commenced shooting I didn't have time to tell which way he went.

Q. Did you see what become of Robert when Smith fired at him?

A. I could not tell you. I run when I saw he was fixing to shoot the last shot. He was shooting right towards me and I run. I staid back in there a little while, and I came back out, and there was women; I don't know who it was, some women came running to me, and said that Charley was killed, and Robert was killed, and John was killed, and Charley was right close to me when I left, and I could not see him, and I looked for John and I could not see him, and I looked down around where Charley was, and I saw Robert laying there, and about that time this Jim Richardson got on Robert's horse, and started to town, and he came right by me, and I wasn't paying any attention to him, and I heard another shot back

behind me, and I looked around, and he was falling off his horse.
313 He got shot right there at the gate as he got out, I reckon

Q. Do you know where Marshal's horse went to after Marshal fell off from it?

A. No, sir; I don't know where he went. When I came back out Jim Richardson was just getting on him.

Q. Do you know where Richardson came from—which way he come to get the gorse?

A. No, sir. He was getting on the horse when I looked around where he was.

Q. State to the jury how close together these three shots were?

A. They were just one right after another. I could not tell you how close together they were. They were one right after another.

Q. First you didn't know who shot?

A. No, sir.

Q. The second was fired by Smith at Welch when Welch was coming right at him?

A. Yes, sir.

Q. Now, how close was Smith to Welch when he fired the third shot?

A. I could not tell you. He was right at him, mighty nigh. He may have been a little bit closer than that man there to me.

Q. I will ask you if you saw any blood?

A. Yes, sir; the third shot, I believe it was, I seen blood—no, it was the second shot. It was the second shot.

Q. Do you know where Welch went to?

A. They say he went——

Q. Never mind what they said.

A. I don't know where he went to. I know he went into some stand, but I don't know whose it was. That is all I know about it.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. You saw the blood on Welch at the second shot?

A. Yes, sir?

314 Q. At the second shot of Smith at Welch?

A. Yes, sir.

Q. Was that blood up here, or did it come this way [indicating]?

A. It come out of his mouth.

Q. Did you see the body afterwards and see that he was shot——

A. I didn't go to look at him at all. The blood come out of his mouth.

Q. And that was at the second shot?

A. Yes, sir.

Q. Where do you live?

A. Muskogee.

Q. How long have you lived there?

A. About 13 years, I guess.

Q. What do you do over there?

A. I work.

Q. What kind of work?

A. Any kind I can get.

Q. Have you ever been charged with any crime?

A. Yes, sir.

Q. What have you been arrested for?

A. For fighting and whiskey.
Q. Where were you arrested and brought for whiskey?
A. I was arrested in Muskogee.
Q. Tried there?
A. No, sir; tried here.
Q. What was done with you on the whiskey?
A. I served a jail sentence here.
Q. How many times have you been here for whiskey?
A. Well, I have served twice here.
Q. Have you ever been arrested for anything else besides whiskey and fighting?
A. No; not that I know of.
(Witness excused.)

315 JAMES SMITH, having been duly sworn upon behalf of the defendant, was examined in chief by Thomas Marcum, esq., and testified as follows, to wit:

Question. Where do you live?
Answer. Muskogee.
Q. Did you know Robert Marshal and John Welch in their life times?
A. Yes, sir.
Q. Do you know the defendant, Charley Smith?
A. Yes, sir.
Q. Were you present at the fair last September at Muskogee?
A. Yes, sir.
Q. Did you see the shooting that resulted in Welch and Marshal's death?
A. Yes, sir.
Q. Where were you?
A. I was at the dance hall there of Charley Smith's.
Q. Where was that dance hall?
A. On the east side of the right of way there that they had.
Q. Do you know where the Tackey Grayson boarding house was, or tent?
A. Yes, sir.
Q. Where was it with reference to the dance hall?
A. Right across on the other side.
Q. Do you know where John Welch's tent was?
A. Yes, sir.
Q. Where was it?
A. Setting right up against Tacky's; on the same side.
Q. Now, tell the jury about the shooting.
A. The first shot that was fired I was in the dance hall, and I run to the door, and John was coming towards Charley, and Charley shot. That was the second shot.
316 Q. The first shot you were in the dance hall, and you run to the door?
A. Yes, sir.
Q. Then what did you see?
A. I saw Charley shoot at John. I don't know whether he hit him or not.

Q. What was John doing at that time?
A. He was going towards him.
Q. How fast was he going towards him?
A. He seemed to be going pretty fast.
Q. How close was he to Charley when he fired the second shot?
A. I guess he must have been about three or four steps.
Q. Then what else did Charley do?
A. He fired again; just as he fired the third shot John turned.
Q. Where did he go?
A. He walked right across on the other side.
Q. Where did he go?
A. He went up there to Ketch Loreno's dance hall, I think.
Q. What else did you see? Was there another shot after that?
A. Yes, sir.
Q. Describe that to the jury?
A. I turned around and looked back this other way, and just as I turned around Robert Marshal fired onto Charley.
Q. How was Charley standing with reference to Marshal then?
A. He was standing with his back towards him like; his left side more to him.
Q. What direction was Marshal from Smith at that time?
A. He was southeast, I think—or southwest, rather.
Q. Shooting north. What did Charley do then?
A. When Robert fired Charley whirled around, and as he
317 whirled around he said something to Robert, I don't know what it was, and about that time they both shot near together.
Q. Marshal then fired twice?
A. Yes, sir.
Q. What become of Marshal?
A. I seen him fall off his horse. I run then, and run into the dance hall. The dance hall was back in that door.
Q. As Welch turned from Smith here, at the third shot, how fast did he go?
A. He didn't walk very fast.
Q. Did Charley shoot at him any time after he turned?
A. No, sir; not after he turned, he didn't.
Q. How fast were these three shots fired at Welch?
A. Pretty rapid; one after the other.
Q. That dance hall there of Charley's, where you were, was made out of what?
A. Made out of lumber.
Q. How was the front fixed up?
A. The front was all weatherboarded up, all but one plank that was left off up to your head.
Q. Could a man setting in that hall, five or six feet from the front, have seen this shooting, sitting down?
A. No, sir; he could not have seen it, setting down, at all?
Q. Did you see anybody in that dance hall when you were in there?
A. I think there was three or four persons in there; I would not be sure.
Q. Do you know George Triggs?

A. Yes, sir.
Q. Was he in there?
A. I didn't see him, as I remember of.
Q. How long did you know John Welch?
A. I have been knowing John, I guess, for about 15 or 20 years.
Q. What size man was he?
A. He was a big, stout man. He must have weighed about 200, I guess; somewhere along there.
318 Q. What was his age?
A. I do not know.
Q. Did you see any wagons in there at any time that day?
A. Just before that shooting commenced there was lots of wagons in there.
Q. What became of them?
A. They all went out.
Q. Do you know where they went to—which way?
A. They went out the gate.
Q. They went out north?
A. Yes, sir.
Q. How long had they been gone when these first shots were fired?
A. I could not tell you how long they had been out there.
Q. About how long?
A. I could not tell.
Q. You could tell whether it was a minute or an hour, or something like it? Do you have any idea how long it was, or did you pay any attention to how long it had been?
A. I never paid any attention to that.
Q. Did you see John Welch after he was shot?
A. Yes, sir.
Q. Did you examine his clothes?
A. No, sir; he had his clothes on when I saw him.
Q. Did you see any white man there about Welch's tent at the time of the shooting?
A. I never noticed any around there. I was not paying much attention to it.
Q. When you came out the shooting had commenced, I believe you say?
A. Yes, sir.
Q. Do you know where Mr. Mintor's house is?
A. Yes, sir.
Q. Where is it, with reference to this tent row?
A. It sets on that road opposite the gate as you go in, across the street.
Q. Across what street?
A. Across the street that runs from town.
319 Q. That is the east and west street?
A. Yes, sir.
Q. That is the street that runs past the fair ground?
A. Yes, sir.
Q. Did you see a bullet hole in that house afterwards?
A. Yes, sir.
Q. Where was it?

A. Over there at Mr. Mintor's house, about 9 feet up—in front of the house—from the ground?

Q. If a line had been drawn from that bullet hole to where Marshal stood, where would that have put the gate? Where would the gate be from the line?

A. The gate would not miss it very far, I don't think.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Where do you live?
A. Muskogee.
Q. How long have you lived there?
A. I guess about 8 or 10 years.
Q. Are you a citizen there?
A. I am a citizen of the Cheroke' Nation.
Q. What is your occupation?
A. I work.
Q. What?
A. At common laboring.
Q. How long has it been since you worked any?
A. I guess it has been about a month; maybe longer than that.
Q. What did you do a month ago?
A. I worked for Brown in the depot.
Q. Don't you know you haven't been doing anything for a long time past but gambling?
320 A. No, sir; I worked for Brown, and then I have a string band there, and I play for people with that.
Q. You gamble on the side?
A. Once in awhile I do.
Q. Have you ever been arrested for anything?
A. Yes, sir.
Q. What for?
A. I was arrested for murder.
Q. Where?
A. Up there at Muskogee; I was tried here and was acquitted.
Q. Have you ever been arrested for anything else?
A. I was arrested once for gambling and was turned loose.
Q. Anything else?
A. No, sir.
Q. Was it Cookey Brown you worked for?
A. Yes, sir.
Q. What kind of work?
A. Worked there in the billiard hall; 'tended the pool table.
A JUROR. What akin are you to Charley Smith, the defendant?
A. I don't know; I guess about a second or third cousin.

Redirect examination by Mr. THOMAS MARCUM:

Q. You were arrested for killing that man Brown, the barber, from Vinita?
A. Yes, sir.
Q. At Muskogee?
A. Yes, sir.
Q. That is the time you were appointed a peace officer up there?

A. Yes, sir.

Q. And he misbehaved and you killed him?

A. I was a guard there working under Frank Smith, the town police they had there at that time.

Q. You were tried right here and acquitted?

A. Yes, sir.

321 Q. I will ask you if there is any law in the Creek Nation against citizens there playing?

A. No, sir.

Q. Nearly all these colored people there play, don't they?

A. Yes, sir.

Q. Do you know where Welch and Marshal's gambling hell was?

A. Yes, sir.

The COURT. You needn't answer that. They are not witnesses here, either one of them. They are dead and buried.

A JUROR. Did Welch have any arms on that day? Did you see him with any arms?

A. No, sir.

Mr. MARCUM (of counsel for defendant). State to the jury how Welch's hands and arms were. What was his position?

A. He had his arms down this way, it seems to me.

Q. Could you see his right hand?

A. I never paid much attention to it.

A JUROR. Did Welch have a belt on?

A. I never noticed. If he did I never paid any attention to it. I was a little excited.

The ASSISTANT DISTRICT ATTORNEY. Just had his arms down by his side walking along?

A. Yes, sir; going towards Charley.

Mr. THOMAS MARCUM (of counsel for defendant). How long had you known John Welch?

A. For about fifteen or twenty years.

Q. I don't know whether the court will permit you to answer or not, but I will ask you if you know what his habit was with reference to carrying a pistol?

The COURT. That is not competent. That is too remote.

Mr. C. J. FREDERICK (of counsel for defendant). We offer to ask the question, and except to the ruling of the court.

The COURT. Yes; the court does not permit it to be answered because it is too remote. You must ascertain whether he was carrying a pistol at that time or not.

322 The ASSISTANT DISTRICT ATTORNEY. There is not a single witness states that he was carrying a pistol.

Mr. THOMAS MARCUM (of counsel for defendant). I will ask you if you know whether he had a pistol?

A. Yes, sir; he had a pistol.

Q. How long had he had a pistol?

The ASSISTANT DISTRICT ATTORNEY. Do you mean right then and there?

The WITNESS. I don't know at that particular time.

The ASSISTANT DISTRICT ATTORNEY. I submit that is not competent.

The COURT. No; that does not make any difference, unless he had it on his person, or in his hand.

Mr. C. J. FREDERICK (of counsel for defendant). If it was known to the defendant that he was carrying a p'stol——

The COURT. You haven't shown that. We can not see what the defendant knew from anything that has transpired yet.

Mr. C. J. FREDERICK (of counsel for defendant). We can show what the habit was——

The COURT. No. No reasonable man has a right to infer that another has a pistol in his hand because he is holding his hand down. That is not a reasonable inference.

Mr. C. J. FREDERICK (of counsel for defendant). We save an exception.

The COURT. Yes.

Mr. THOMAS MARCUM (of counsel for defendant). Will the court allow us to ask the witness now as to Welch's strength?

The COURT. No; I don't see that it cuts any figure.

(Witness excused.)

323 A. B. BROWN, having been duly sworn upon behalf of the defendant, was examined in chief by Thomas Marcum, esq., and testified as follows, to wit:

Question. Where do you live?

Answer. Muskogee.

Q. Do you know Bob Welch and Bob Marshal in their lifetime?

A. Yes, sir.

Q. Do you know the defendant?

A. Yes, sir.

Q. Were you at the fair there last September at Muskogee?

A. Yes, sir.

Q. Did you hear the shooting between the defendant and Welch?

A. Yes, sir.

Q. Where were you?

A. I was right at the gate where it come in, where the shooting happened.

Q. At the gate?

A. Yes, sir.

Q. What direction were you from the place of the shooting?

A. I think I was a little north of the shooting.

Q. How far north?

A. I was at the gate. I don't think I was over about 20 or 30 steps; twenty steps, I guess.

Q. State to the jury what you saw.

A. Well, I saw Marshal shoot at Smith twice. He shot once, and then they both shot pretty near at the same time the second time.

Q. What direction was Marshal shooting?

A. Shooting towards me.

Q. What direction was he shooting with reference to Smith?

A. Smith was kind of between me and Marshal.

Q. Shooting north, then?

A. Yes, sir.

324 Q. How was Smith standing with reference to Marshal when Marshal fired at him?

A. Smith was facing me when he first shot.

Q. And his back was to Marshal?

A. Yes, sir.

Q. What did Smith do then?

A. He whirled and shot.

Q. What become of Marshal then?

A. I suppose he shot Marshal. I saw his horse rear and turn the other way when he shot.

Q. What become of him?

A. He fell off his horse, and in a few seconds Mr. Richardson got on his horse and rode out at the gate right where I was, at the gate, and as he struck the gate, right at the gate, Mr. Bennett shot Richardson, and he fell off, and he was going to shoot again at him, and I spoke to him and told him he was shooting the wrong man; that that was Richardson.

Q. As Richardson came out at the gate where was Bennett?

A. Right at the gate.

Q. Which side of the gate?

A. Next to the fair ground.

Q. Is that east or west?

A. I think that is east.

Q. East of the gate?

A. Yes, sir.

Q. Then which direction did Bennett shoot at Richardson?

A. Right west.

Q. Do you know where Mintor's house is?

A. Yes, sir; right across the street.

Q. What direction from the gate?

A. North.

Q. Did you see any bullet hole in that house after this?

A. Yes, sir.

Q. How high was it from the ground?

A. About 9 feet, right close to the top of the window; about 6 or 8 inches from the top of the window.

Q. A line drawn from that bullet hole to where you saw Mar-
325 shal, where would the gate be with reference to that line?

A. Right about the center of the gate; right straight up the alley.

Q. Did you see any of the shooting at Welch?

A. No, sir; the crowd was rushing so that I could not see them until after Marshal rode up and shot at Smith. Smith was standing there; looked like he was looking at Welch. Welch went over kind of towards the fair ground, the east side of the row of tents, and Smith was kind of watching him when Marshal rode up and shot. When he shot at Smith, Smith whirled, and they both shot again very near at the same time. There wasn't much difference in the two shots.

Q. You were out there by the gate?

A. Yes, sir.

Q. How many people did you see back in there after these three shots fired? How many shots did you hear altogether?

A. I think there was six shots fired altogether.
Q. How many shots were fired before you saw the shot by Marshal?
A. I think there was three or four. Three shots I think.
Q. Where were you at that time?
A. I was right at the gate.
Q. How fast were these first three shots fired?
A. Well, it was pretty fast. They were all shot in a few seconds.
Q. And then you looked up that way and saw the crowd in the street?
A. Yes, sir.
Q. Is that the reason why you could not see the shooting?
A. Yes, sir; the crowd was awful thick. When the shooting first started I could not see Welch and Smith for the crowd that rushed in getting out of the way, but I could see Marshal because he was on a horse.
Q. The crowd then between where Mr. Smith was and you was very thick?
A. Yes, sir.
Q. Could you demonstrate to the jury with your fingers about
326 how quickly these first three shots were fired?
A. Well, they were shot pretty fast, nearly as fast as a person could cock a pistol.
Q. In rapid succession?
A. Yes, sir.
Q. How often had you been there about the grounds and about these tents there?
A. I had been there off and on all the time that the fair was going on.
Q. How long have you been there about Muskogee?
A. Ever since about three years ago.
Q. Are you a member of any nation or tribe?
A. Yes, sir; of the Cherokees.
Q. You are a brother of John Brown, I believe?
A. Yes, sir.
Q. Do you know anything about Charley Smith's dance hall, what it was made out of?
A. Out of lumber.
Q. How was the front of it?
A. It fronted out to the street. There wasn't any door in it, I don't think, but a hole there to go in and out at.
Q. Do you know where the seats were arranged in there?
A. Yes, sir; there was seats along next to the side, next to the alley where it fronted out in the street. There was a row of boards put along there to set on.
Q. If a man had been sitting back in that dance hall, five or six feet from the front, could he have seen Charley's tent?
A. No, sir; I don't think he could.
Q. What sort of a fence was that in front of the fair ground; on the north side, I mean?
A. There wasn't nothing only a wire fence there.
327 Q. I mean the fair ground fence, on the north side of the east and west fence.
A. The fair ground fence is a tight board fence.

Q. How was it made?
A. It was made with up and down boards.
Q. How was it put up?
A. On posts, I suppose.
Q. How many feet apart? I want you to describe the fence.
A. Do you mean the fence into the fair grounds?
Q. Yes; around by the ticket office.
A. That is a tight board fence, I should judge about six or seven feet high.
Q. How was it with reference to the plank; how close were they?
A. They were put right up together so you could not see through or see in.
Q. What sort of a fence was it that run from the northwest corner of the fair ground there by the gate back south, between the fair ground and this tent row? What sort of a fence was that? The northeast corner that run across from Mintor's house. The ticket office is here, and here is a gate, and t'en down here is another gate, isn't there?
A. Yes, sir.
Q. Now, this corner, this north side of the fair ground; was there a fence running back here, south?
A. Yes, sir; there is a fence running back, back of these stables.
Q. How tall is this fence. Where does it start from?
A. It starts from the corner of the fair ground.
Q. The northwest corner?
A. There ain't no fence there.
Q. I am speaking of the northwest corner of the fair ground?
A. That is a board fence down there back of these stables, you mean?
Q. Yes. What direction are the stables from the front gate?
A. They are east—well, where the corner of the fence is——
328 Q. From the corner of the fence down here—I am making a fence out of this railing here. Mintor's house is over here and the fair ground fence here, running east and west. Now, I am asking you about the fence over here south, towards the stables. What sort of a fence is that?
A. It is a board fence.
Q. How high is that?
A. It is about six or seven feet high.
Q. How is it made?
A. It is made high, up and down boards.
Q. Could a person stand over here, five or six feet from the corner, and see how that shooting occurred?
A. No, sir; they could not see for the high fence, and the stables is right here against the fence most.
Q. Is it possible for a person in there to have seen a man on a horse where the shooting occurred?
A. I think not.
Q. Do you know where that merry-go-around was, or was there one in the fair grounds?
A. Yes, sir.
Q. Where was that?

A. That was right close down to the round house there. It was right about 30 or 40 steps from the judges' stand.

Q. Could a person anywhere about that merry-go-around, where it was inside of the fair ground, have seen where Charley Smith's tent was?

A. No, sir.

Q. Was it possible for a person in there to have seen over here?

A. No, sir.

Q. How many stables are there?

A. Six, I think.

Q. What direction do they run?

A. Well, from the fair ground to this merry-go-around they are right out west.

Q. What direction do they run on a line?

A. They run north and south.

329 Q. Where are they situated with reference to the tents over here?

A. Well, they would be situated this way [witness explains on diagram their location].

Q. Now, do you know where the other merry-go-around was, down there, in these colored peopl/es' crowd?

A. Yes, sir; it was still back west behind the row of tents.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. How long have you lived at Muskogee?

A. Three years.

Q. Are you charged with any offense there?

A. No, sir; they taken me up for whiskey just a short time ago.

Q. That is not an offense?

A. I didn't consider it so, because I wasn't guilty.

Q. Have you had your trial?

A. No, sir.

Q. You are now under indictment at Muskogee for introducing whiskey into the Indian country?

A. Yes, sir.

Mr. THOMAS MARCUM (of counsel for defendant). We object to that question.

The ASSISTANT DISTRICT ATTORNEY. Have you ever been arrested for anything else?

A. No, sir.

Q. What is your business?

A. Training horses; driving trotters.

Q. Are you the man they call Cookey Brown?

A. Yes, sir.

Q. You run a billiard hall there, didn't you?

A. Yes, sir; I did, but I sold it.

Q. With a sort of blind tiger attachment to it?

A. No, sir; I didn't have any blind tiger.

330 Q. When did you sell that out?

A. Last week.

Redirect examination by Mr. THOMAS MARCUM:

Q. Do you know what a blind tiger is?

A. No, sir; I suppose a tiger without his eyes, with his eyes punched out, would be called a blind tiger. (Laughter.)

Q. I suppose he means if you sold any whiskey there or not?
A. No, sir; I never sold a drop of whiskey in my life in the Territory.
Q. Did you keep for sale intoxicants of any kind there?
A. No, sir.

Recross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. You run a gambling house there, didn't you?
A. I don't know that we run much of a one. The boys came there and sported a little in the back part, but that part I had nothing to do with.
(Witness excused.)

331 CHARLES SMITH, the defendant, having been duly sworn in his own behalf, was examined in chief by Thomas Marcum, esq., and testified as follows, to wit:

Question. Where do you live?
Answer. I live at Muskogee.
Q. How long have you lived there?
A. I have been living there ever since 1875; I guess it was sometime along there.
Q. Are you a member of any tribe?
A. A citizen of the Cherokee Nation.
Q. Where were you born and raised?
A. Ft. Gibson, Cherokee Nation.
Q. How old are you?
A. I don't know my age exactly, but I think I am about somewheres along 37 or 38.
Q. Did you know John Welch and Bob Marshal?
A. Yes, sir; I knew John. I was very nearly raised up with him.
Q. How old was John?
A. John was somewheres near about 30 years old; what he claimed to be. We always disputed his age, but he claimed to be about 30.
Q. What size man was he?
A. John was a great big, large man.
Q. How was he as compared with yourself in size?
A. He was a great deal larger than I was.
Q. Well, as to his strength?
A. He was always said to be the best man——

The ASSISTANT DISTRICT ATTORNEY. I submit, at this time he is not entitled to state that.

Mr. C. J. FREDERICK (of counsel for defendant). I suppose it
332 would be relevant for him to state what he knows.

The ASSISTANT DISTRICT ATTORNEY. He was stating what was said to be.

Mr. C. J. FREDERICK (of counsel for defendant). That wasn't the question that was asked him. He can state what he knows himself.

The COURT. He can state that.

The WITNESS. I know myself he was the best man around there.

Mr. THOMAS MARCUM (of counsel for defendant). How was his strength with reference to yours?

A. He was a stouter man than I was.

Q. How do you know that?
A. We have tussled together all the way up from boys.
Q. How long had you known Marshal?
A. I have been knowing Marshal, I guess, ever since I can remember.
Q. Of what nation was he a member of?
A. Creek Nation.
Q. Did you see Marshal the night before this shooting?
A. Yes, sir; I saw him that night.
Q. Do you know where he boarded?
A. He staid at John Welch's.
Q. Where did John Welch live?
A. In Muskogee.
Q. What business had you out there at the fair ground?
A. I had a dance hall to myself, and we had a boarding stand, a part interest in that.
Q. Where was the eating stand with reference to the dance hall?
A. The eating stand was on the west side of this pass way we had there, and my dance hall was on the east side.
Q. Now, about what direction was the dance hall from the tent?
A. I guess it was a little southeast of the tent.
333 Q. How long had you had the tent and dance hall there at the time of the shooting?
A. I completed them on Saturday before the fair.
Q. Do you know what day of the week this was?
A. On Thursday.
Q. Do you know what time of day the shooting occurred?
A. It must have been between 11 and 12. It was only a few minutes, I think, to 12.
Q. Now, just go on, in your own way, and state to the jury how this matter came up, and all about it.
A. I hadn't very long came out from town in my buggy, me and my brother Albert, and he wanted the buggy to go back to town in to see what time his wife wanted to come out there, and so I turned it over to him, and I went over to the dance hall, and I was back in there. On the back end of my dance hall there was a little place attached to it where the boys shot dice in there; and I had been back in there awhile, and I came out there where the dance part was; and there was some ladies in there, and they wanted me to get the music and start up a dance, and I told them that the fiddler wouldn't be back there before afternoon, and then we would start up the dance?
Q. Who was the fiddler?
A. I forget his name. He was from over between the rivers. I had two fiddlers, and they were from over the river, and I didn't know them.
Q. Did you know either one of them?
A. Well, I was told their names at the time, but I don't remember now.
Q. Do you know who these women were?
A. No, sir; they were country girls.
334 Q. Go on, now.
A. And so I told them to go over to the eating stand and wait for dinner. I told them dinner would be ready in a few minutes, and so

they started out, and I started out with them. As we got out on the front of the dance hall, the wagons were all lined out from the gate below apiece, and I left the ladies there and started up the line on the east side, and I met this man that owned the ground, Jim Lively——

Q. Never mind what he said.

A. I met him, and I says to him——

Q. Never mind what you told him. What did you do?

A. I started on up to the gate, and just before I got to the gate there was a lot of boys and girls standing there, and I just spoke, and went on up on the west side; and as I got up to the gate this old man Newlin with his team stood right in front of the gate, and I says to him—I didn't know his name; I knew him around there. I asked him to drive his wagon on out and let those teams pass out; and with that I went across the street ba'k there, and he didn't say a word to me, and I turned there, and there was a white man had driven in on the west of me, and he could not go any further down, or he could not get back out; and I said, "Boss, you ought not to have driven your team in when you saw you could not have gotten any further;" and he said "I wanted to see if any of the people wanted to buy any watermelons;" and I says "There is two of you. One of you could have walked down there alone and found out who wanted melons, and after the way was cleared out you could have driven on down." He says "Yes, he would get out if he could, but he could not get out." I turned back to this darky, and I says to him the second time, "Drive your team on out, and let this team on out," and he didn't say a word. He just fast-
335 ened *his* his reins, he was on the opposite side of his wagon from me, and in the act of getting off. I says, "Now, if you don't take your team and get out, I will cut your reins, and I will lead your horse out;" and by that time he was off his wagon, and had his lines wrapped, and I had my knife in my pocket, and I took it out and cut his reins, and led his horse out, and these teams passed on out, and still this old fellow had never said a word to me at all. I goes on back, going down to my eating stand, and as I was passing where Welch's stand was, he says "What in the hell are you bothering that man for?" I says "They have not got any business filling up this place." I says "We are paying rent for this ground, John;" and he says "You God damned son-of-a-bitch, you are getting too smart, anyhow;" and I says "John, you ought to be ashamed of yourself to talk to me that way. You have got all you can do to look out for yourself;" and he said "God damn you, I will show you;" and at that time he was setting just on the inside of his stand on a box or stool, or something he had in there, setting right in front, and he just got off of it that way as he said that word, and I rushed away from him. My door was close there, and I knew I could not handle him at all, and I rushed away from him, and just got to my door, and just barely stepped in, and as I looked he was just coming right on. There was some people standing near his stand, against the wall between me and him, and he had to kind of walk around them. As he was passing around them he acted as though some one had spoke to him behind him, and he says "God damn him, I will kill him;" and he had his hand in this shape, and this man Scott Gentry was on the other side of my place, and just as he started around that way,

he had his hand this way, and I grabbed his pistol, and made out
336 and made a little step from him and fired, and he kept right on to me, and I moved a little back again, and fired again, and when I fired the second shot he only turned, and of course I was excited, and I fired again.

Q. Why did you fire the first time?

A. I fired the first time because I was satisfied he was going to kill me. He was coming right after me, and had his hand back this way. I had been told by three different men——

Q. What if he did have his hand back; you say he had his hand back that way?

A. Yes, sir.

Q. Why did you fire?

A. I done it to save myself. I thought he was going to kill me right then.

Q. Why did you think so?

A. Because he had told three other men that he was going to kill me.

Q. Had you been told?

A. Yes, sir; I was told. I think it was just the day before. It was either on Tuesday or Monday.

Q. Who told you?

A. Mr. Dave Roberts told me.

Q. What did he tell you?

A. I don't just remember. He told me that I had better watch John, that John told him he was going to kill me, and went on to tell me a rigmarole, something about his wife. I told him I didn't know anything about his wife.

Q. What about his wife?

The ASSISTANT DISTRICT ATTORNEY. I don't think there is a thing in it, but it is not admissable to go in as a side issue.

The COURT. He must confine himself to threats. He can tell if he heard threats, but he can't tell anything else.

Mr. C. J. FREDERICK (of counsel for defendant). He was proceeding to tell threats.

337 The COURT. He was telling something about his wife. That is only to lug in something else. That is not competent.

Mr. C. J. FREDERICK (of counsel for defendant). The threat, if you will allow him to tell what the threat was——

The COURT. He can tell the threat.

Mr. C. J. FREDERICK (of counsel for defendant). And he can tell what it was that the man told him——

The COURT. No, he can't tell anything else but the threat.

Mr. C. J. FREDERICK (of counsel for defendant). That was in the threat. That was embraced and included in the threat. The threat was in connection with the deceased's wife.

The COURT. He can tell what the threat was. You need not tell the witness what to tell. That is giving him information. You need not state any further.

Mr. THOMAS MARCUM (of counsel for defendant). When was it that Roberts told you of this threat?

A. It was either on Monday or Tuesday, one. I think it was Tuesday.

Q. Where was he when he told you; do you remember?
A. I think he was right there on the ground. He was on the ground or in town, one.
Q. Did you attend a dance there any time that week?
A. Yes, sir.
Q. Where?
A. At Mrs. Mayfield's, right across from John's place.
Q. At the time you went down to get these wagons out had you had any words with Welch at all?
A. No, sir.
Q. When was the first time that you and he had had angry words?
A. The first time that we had angry words was as I came back from the gate.

Q. Did you know that he was mad about it before you came
338 back there?

A. No, sir.

Q. Who were you renting the ground for for business purposes there?
A. Mr. Tom Lively.
Q. State to the jury whether or not you had any arms of any kind except that little knife.
A. That was all I had; was a little knife.
Q. Did you have any pistol there?
A. No, sir.
Q. Or gun of any kind about your tent?
A. No, sir; I had no knife at all only the little knife I had in my pocket.
Q. Do you know whether Welch had any or not?
A. Yes, sir; he had a gun the night before, I know.
Q. Did you see it?
A. Yes, sir; he wanted to pawn it to me for four and a half until after the fair, and give me five dollars and fifty cents for the use of the money.
Q. Was there any way for you to get out through the back of your tent?
A. No, sir; it was all closed up, and right against a man's fence behind there. There was no way to get out back there at all.
Q. Would you have got away from him if you thought you could?
A. Yes, sir; I was going away from him when I run off from him at the start.
Q. When you run off from him, and when you cast your eye back at your tent and saw him coming, I will ask you if at that time you expected to find Scott Gentry there?
A. No, sir.
Q. What did you go into the tent for?
A. I went in the tent getting away from him when I first went in there.
Q. You say you unexpectedly saw Gentry there?
A. Yes, sir.
Q. How come you to see the pistol?

A. He had his back turned to me. He was talking to someone
339 further down in the tent, and he had his back to me. I just stepped to the door and just turned my head, and John was coming right at me, and he said "God damn him, I will kill him."

Q. What was his attitude at that time?

A. He had his hand right back here [indicating by placing right hand back towards hip pocket of pants].

Q. Which hand?

A. Right hand.

Q. How was his left?

A. His left more behind him at that time. There was some people—as he came out this way there was people standing in here, and he had to come kind of around them, and that throwed him kind of plumb this way to me as he turned around.

Q. What was it he said?

A. He said, "God damn him, I will kill him."

Q. Who was he looking at at that time?

A. At me.

Q. How close was he to you at that time?

A. He was as close to me at that time as this gentleman here [indicating about 5 feet].

Q. When you fired the second shot how close was he to you?

A. He wasn't a bit closer to me. I backed from him. I give back until he turned.

Q. Now, I will ask you to state to the jury if you shot any after he turned around.

A. I shot just as he turned.

Q. Did you shoot any after that?

A. No, sir.

Q. Where did you go then; what became of you then?

A. He walks across kind of angling from his place to another dance hall that was run by Ketch Loren, and I just moved just a little from my door; I moved a little back, and was watching him to see where he
340 was going. As he started off he kind of put his hand in his pocket like that, and I was standing there watching him; and all at once I heard a shot, and the ball struck right down in front of me, and I turned around and looked and I saw it was Robert, and he had his pistol in the act of raising it again—Robert Marshal—and I says, "Robert, what are you shooting at me for," and he was just in the act of bringing his pistol up again, and as quick as I could I throwed right down and fired.

Q. How many times did Robert fire then?

A. Our pistols went off together the last time.

Q. That is, the last shot?

A. Yes, sir; he fired two shots.

Q. You didn't see his first shot?

A. No, sir.

Q. Where did it come from?

A. It come from back behind me.

Q. Did you see anybody else with a pistol but him; that is, when you turned?

A. No, sir.

Q. I will ask you to state to the jury 'f you had anything against Marshal, or any feeling between you at all before that?

A. No, sir; we were just as good friends as could be. I never had anything against him, and if he had anything against me I did not know it. We had taken a couple of drinks in town together that morning.

Q. Did Marshal say anything?

A. No, sir; if he said anything I never heard it.

Q. Did you fire any shots at Welch after Marshal shot at you?

A. No, sir; that was over.

Q. Did you know where Marshal was at the time you shot at Welch?

A. No, sir; I didn't know he was on the ground. He had been
341 out there before that in his buggy, and had left again, and I didn't know he was on the ground at all.

Q. I will ask you if you heard of any other threats from Welch?

A. Yes, sir; this man Alf , about a month before this——

Q. I will ask you if prior to this time he had made any demonstration towards you?

A. There was a young fellow that was raised up with us that lived in Ft. Gibson, Abe Davis, he works for Dr. Howard and he comes over there two or three times a week to Muskogee.

Q. Never mind about that. I am just asking if Welch before this ever made any demonstrations toward you, and if so, what for?

A. That was last June, I guess it was along about the first of courts, and the marshals went down to his house and searched for whiskey, and he accused me of being the cause of the marshals going down there.

Q. What did he say? Don't state any of the details of it, but just state what he said to you about it.

A. Well, we met up right there in the road, right close to that little bridge just north of his house, and he just come out and went to cussing me, called me a God damned little low down son-of-a-bitch for having the marshals going to his house and searching for whiskey.

Q. What else did he say?

A. I don't remember everything that he said. I didn't pay any attention to him.

Q. What did he do?

A. He made at me there, and this fellow kept him from doing anything.

Q. What did you do then?

A. I never done anything. I got away from him, and then me and this young fellow went up in town.

342 Q. Do you know anything about whether Welch, on this day of the killing, was drunk or sober?

A. Me and Welch, it seems to me like it was Simps Bennett, I don't remember who it was now, but it was some Cherokee, we went into his place Welch had and give me a drink. He had taken me into his dice room. He had a door that goes right in behind his counter where he was staying into his dice room, where he had his dice table and card tables, and he taken me in there, and he had given me a drink, and after I came out I am pretty well satisfied it was Mr. Bennett, or some Cherokee. I came back——

The COURT. We don't want all this stuff. You were asked the question as to whether he was drunk.

The WITNESS. We went in there and we drank together, and then I carried this other man in there and we drank again together.

Mr. THOMAS MARCUM (of counsel for defendant). How long was that before the shooting?

A. That was two hours before the shooting.

Q. Could you tell from his manner there whether he was drunk or sober?

A. I don't think he was drunk. He was drinking some.

Q. Just state to the jury whether you would have shot him, whether or not you would have done this if you had not believed you were in danger.

A. No, sir; I would not have done it for anything in the world, only because I believed I had to do it to save myself.

Q. What did you do with the pistol after that?

A. After Robert's horse whirled, and he fell off his horse, I walks right across in between me dance hall and the ladies' place, where I kept
343 an eating stand, right in through there, and there is where I dropped the pistol, right down in there.

Q. Did you see after that this man Wiley McIntosh?

A. As I went out between these two tents, there is where that ditch is. There is a ditch right back of the tents, that is, between the fair ground fence and our tents, and of course the alley runs up each way, and just as I got around there I happened to look up and I saw Wiley, and just as I turned he raised his pistol like that, but whether he snapped or fired I don't know. I just turned the other way and went right down past one or two stands.

Q. State to the jury whether you had a pistol at that time.

A. No, sir; I dropped it right there where they got it at.

Q. Did you or not snap at him at that time?

A. No, sir; I never snapped at any one except these two men.

Q. After that where did you go?

A. I went down that line apiece, and then turned and came back into the a big tent that is right on the end there that I think was put up for a kind of a singing concert——

Q. Where did you go?

A. I went in that, and there wasn't a soul in it, and I came back the way I had went in, and came into Polly Evans's tent, and there was two or three ladies setting down in there on chairs and a pile of bed clothes, and I just set down on them and just lay there on them.

Q. What became of you then?

A. She went out for somebody and came back in in about 15 or 20 minutes.

Q. State where you went, and why? Where did you go, if you went anywhere, and why?

A. I thought then that them fellows would come there, and if they found me they would kill me.

344 Q. Where did you go?

A. I went from there out right straight on south, got through the wire on the south part there, and then down through Mr. Crabtree's——

Q. How far is Crabtree's from this place?

A. Oh, it is over half a mile, or near that.

Q. State to the jury whether or not you tried to get away from the town.

A. No; I didn't want to get away at all. I only wanted to get away from the ground because I knew that Robert had brothers there and friends, and I was satisfied they would kill me if they found me; and so I went away.

Q. When you got to Crabtree's, was there any other house between that and Coody's Creek?

A. No, sir; nothing but pastures.

Q. Was there anything to prevent you going to Coody's Creek and getting away?

A. No, sir.

Q. Did you try to get away?

A. No, sir.

Q. You went from Crabtree's back up by your house?

A. Yes, sir.

Q. What street do you live on?

A. It is called Court-house street.

Q. Is that the street the court-house is on?

A. Yes, sir; my house fronts the court-house street on the east side.

Q. Is it settled up along that street up as far as the court-house?

A. There is houses thick all through there.

Q. On each side?

A. On both sides of me. There is houses all the way after you get down and leave Crabtree's and go west; there is houses all the way to Coody's Creek.

Q. It is thick settled, then?

345 A. You mean there is houses there from there to Coody's Creek?

Q. I mean from Crabtree's up to the court-house is there any houses?

A. Yes, sir; they are thick. It is thick settled in there.

Q. On which side of that street is it settled—the street that goes up from your house to the court-house?

A. On both sides—east and west.

Q. How thickly are the houses from there to the court-house?

A. They are as thick as they can be. There is no vacant lot in there at all.

Q. Which street is the Catholic church on?

A. The Catholic church fronts Court-house street.

Q. Where did you go from your home?

A. I went right on up by the Catholic church, and right on up between Johnny Bennett's place and Mr. Blackstone's, and then came right in there by Dr. Fite's and Mr. Lipscomb's, and right in by the white Baptist church and the colored Baptist church, right in back of the Court-house, and went into Mr. Spencer's.

Q. Were you acquainted with Spencer?

A. Yes, sir; I worked for him about four years, off and on.

Q. You knew him well, did you?

A. Yes, sir.

Q. What sort of a place did he keep there?

A. He kept a boarding house there.

Q. How long had he been keeping a boarding house?

A. He has taken boarders there regularly for I guess it is about a year. He always did keep a few, you know, before that.

Q. What did you go into the coal house for?

A. I didn't go into the coal house.

Q. Whatever house it was?

346 A. It was the servants' room there. I knew all about the place. I came in at the front gate——

Q. What made you go in there?

A. I went in there to stay there until all the excitement was over.

Q. What was your intention then?

A. Well, my intention was—I wanted to see Mr. McKellut; he was a lawyer; I didn't think they would bring me here; I thought it was a nation case.

Q. What is McKellut?

A. He is a lawyer, and was judge awhile.

Q. Of the Creek Nation?

A. Yes, sir.

Q. Your intention was to keep out of the way until the excitement died out?

A. Yes, sir.

Q. And then go to him?

A. Yes, sir.

Q. And you expected then to be tried in the Creek country?

A. Yes, sir.

Q. State to the jury whether you had any idea of trying to get away from the law.

A. I had no idea at all of getting away; if I had, I never would have went there. I had three horses up home there.

Q. I will ask you if you had any arms from the time you left the fair ground until you got to Mr. Spencer's?

A. No, sir.

Q. Did you have any when you were arrested?

A. No, sir.

Q. Did you try to get any?

A. No, sir; I had a shotgun at home there.

Q. Had you ever had any pistol since you dropped that over there?

A. No, sir.

Q. How far was it from Spencer's where you went to the United States jail?

A. It don't seem to be any further than the far corner of this building; maybe it is a little bit further, but I don't believe it is.

347 Q. Where was Spencer's house with reference to the United States jail and th' United States court-house?

A. His house stood right in between the two.

Q. How is that neighborhood around Mr. Spencer's settled up?

A. It is just as thick as it could be. There is no vacant lot there.

Q. How far is that from the main business part of town?

A. I think it might be about 150 or 200 yards.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. You havn't told us about dressing up in women's dress.

A. They told me not to tell any de'ails, to just go ahead——

Q. That is a detail that I want. You put on a woman's dress over there, didn't you?

A. Yes, sir.

Q. Did you put a bonnet on?

A. Yes, sir.

Q. And went out from the fair ground as a woman?
A. Yes, sir.
Q. How much do you weigh?
A. I was weighed sometime before the fair, at the hardware store, and I weighed 185 pounds.
Q. You would weigh 190 now, wouldn't you?
A. Yes, sir; I am satisfied I would weigh more than that now.
Q. Don't you weigh over 200 right now?
A. I don't know what I weigh. I think I have gained a good deal since I have been here in jail.
Q. How tall are you?
A. I don't remember.
Q. Stand up on your feet just a moment.
(Witness stands up.)
Q. You are 37 or 38 years old, I believe you say?
348 A. Yes, sir; I guess that; my father didn't know my age.
Q. Have you ever been arrested before?
A. Yes, sir.
Q. What for?
A. I was arrested the first time for murder.
Q. Brought here and tried, were you not?
A. Yes, sir.
Q. What was done with you?
A. They convicted me of manslaughter.
Q. How much time did you get in the penitentiary?
A. Ten years.
Q. When did you get out?
A. I don't remember; it was in the winter of 1888, I think it was.
Q. Who was the man you killed?
A. His name was Willstead; I don't remember his first name.
Q. Was he a citizen of that country?
A. Yes, sir; he was an adopted citizen.
Q. Of the Creek or Cherokee country?
A. Of the Creek country.
Q. That is, he had married a Creek woman?
A. Yes, sir.
Q. Have you ever been arrested for anything else?
A. Yes, sir; for whiskey.
Q. What else?
A. That is all; and for gambling and such as that, at Muskogee.
Q. How many times have you been arrested for whiskey?
A. I was brought here twice.
Q. Were you ever convicted for whiskey?
A. The last time I was here I plead guilty.
Q. Have you ever been arrested for anything else?
A. Only gambling.
Q. Anything else?
A. No, sir.
Q. You say that Dave Roberts told you of these threats. Dave
349 told you?
A. Dave is one man; yes, sir.

Q. Where is Dave?
A. He is here, I guess.
Q. You say that Alf Shoat told you of them?
A. Yes, sir.
Q. Where is Alf?
A. He is here, too.
Q. You didn't snap your pistol at McIntosh?
A. No, sir; I never snapped my pistol at McIntosh at all.
Q. Did you discover that you had emptied all the loads out of the pistol before you had thrown it away?
A. No, sir.
Q. Didn't you examine it to see whether it was empty, and when you found it was you threw it away?
A. No, sir; I dropped it so the owner could get it.
Q. You knew that Scott Gentry was an officer, didn't you?
A. Yes, sir.
Q. You knew he was armed as an officer, as an Indian policeman, at the time, didn't you?
A. I didn't know whether he was an Indian policeman; he lives out west of Choska.
Q. You knew he was an officer, you said?
A. Yes, sir; but I didn't know what kind of an officer he was. He lives twenty miles west of Muskogee.
Q. Didn't you know he was an Indian policeman?
A. No, sir; I didn't know what he was.
Q. Didn't he have on an uniform?
A. He was in his shirt sleeves; he always wore blue clothes.
Q. Just like all these United States Indian policemen?
A. There is lots of them wear blue clothes that are not.
Q. Isn't it true that the Indian policeman wear blue uniforms?
A. Yes, sir.
Q. Now, why didn't you appeal to him to keep down that dif-
350 ficulty?
A. I didn't have time to do anything.
Q. You had the same time to tell him that there was a man about to kill you that you had to jerk his pistol out without warning and lower it down and shoot the man down? You had time to speak, didn't you? It wouldn't have taken any more time to have spoken than it would to grab the pistol. Why didn't you tell him? He was an officer there. Why didn't you tell him?
A. I told you I didn't have time. This man was rushing on me.
Q. Do you mean to tell us you didn't have time to speak?
A. No sir; I didn't.
Q. Why is it you had time to grab that pistol out and run around there?
A. I didn't run around there. I just grabbed his pistol, and throwed that foot outside of my door and fired.
Q. It would have taken less time to have spoken than it required to do that?
Mr. THOMAS MARCUM (of counsel for defendant). Let him say so.
The ASSISTANT DISTRICT ATTORNEY. Is that all the reason you can think of why you didn't appeal to the officer that was right there?

A. I didn't have time to think. I knew this man was going to kill me.

Q. That is the only reason you can give?

A. Yes, sir.

Q. As a matter of fact, don't you know that you meant to kill the man, and wanted to kill him, and saw your opportunity to do it, and for that reason you came out and shot him down, seeing that he was unarmed? Isn't that true?

A. No, sir.

Q. Didn't you hear Robert Marshal tell you to hold up, and stop shooting that man?

A. Robert Marshal never said anything of that kind to me. He
351 never opened his mouth to me. Me and Robert were good friends. There was nothing wrong between us. We were gambling together all the time.

Q. What was the name of the man that was present when John Welch was abusing you, because he thought you had given him away to the marshals?

A. Abe Davis is his name.

Q. Where is Davis?

A. He is in Ft. Gibson. I sent his name to the colonel, and wanted to have him subpœnæd. I don't know whether he got it or not.

Q. That is in Ft. Gibson up here on the railroad?

A. Yes, sir.

The COURT. Did I understand you to say that this man wanted to pawn his pistol the night before to you?

A. Yes, sir.

Q. Wanted to pawn it to you during the fair?

A. Yes sir; until after it was over.

The ASSISTANT DISTRICT ATTORNEY. You didn't take it?

A. No, sir; I told him I didn't have any money to spare. If I had I would have let him have it. I knew I had to borrow money to start up with.

Q. That was John Welch on the night before the difficulty?

A. Yes, sir.

Redirect examination by Mr. THOMAS MARCUM:

Q. How long has it been since you were convicted of manslaughter?

A. That was in 1879, I guess it was.

The COURT. He was sentenced September 16th.

A JUROR. Did that man Welch have any pistol on that day?

A. I didn't see it. He had his hand back here. That is all I know. He says, "God damn him, I will kill him," and throwed his hand
352 back here.

Q. You didn't see any pistol? He didn't pull his hand up here with a pistol and present it at you?

A. No, sir.

(Witness excused.)

353 A. B. BROWN, being recalled by defendant, was examined by Mr. Thomas Marcum, and testified as follows, to wit:

Q. You know Wiley McIntosh?

A. Yes, sir.

Q. Did you see him there?
A. Yes, sir.
Q. Where was he?
A. He was right between the tents and the fair-ground fence.
Q. What was he doing?
A. Well, when I saw him he was snapping his pistol at Smith.
Q. What was Smith doing?.
A. I could not see Smith. He was down in the lot.
Q. How do you know he was snapping at him?
A. I don't know only by what folks said. I saw it snapping, and they said afterwards that is what it was. I never did see Smith, though.
Q. Do you know where this pistol was found?
A. No, sir; I don't know only what was said.
(Witness excused.)

353½ ALFRED SHOAT, having been duly sworn upon behalf of the defendant, was examined in chief by Thomas Marcum, esq., and testified as follows, to wit:

Question. Where do you live?
Answer. Muskogee.
Q. Did you know John Welch in his lifetime?
A. Yes, sir.
Q. And Robert Marshal?
A. Yes, sir.
Q. Do you know the defendant?
A. Yes, sir.
Q. I will ask you if you know when this killing took place of Welch.
A. Yes, sir; I know about the time.
Q. Where were you at that time?
A. I was in Checotah, 21 miles from there.
Q. When did you return to Muskogee?
A. The following night.
Q. How long had you known Welch?
A. About 10 or 11 years.
Q. I will ask you to state to the jury if you heard him make any threats previous to this time against the life of the defendant.
A. Yes, sir; I did, several times.
Q. What did he say?
A. The last threats I know him to make was when they had some words about a month or some time shorter than that before this killing took place and he said he would kill him the first opportunity, or the first chance.
Q. Did you tell Smith of it?
A. Yes, sir; I told him during the next day.
Q. I will ask you if you saw Welch after he was shot?
A. Yes, sir.
Q. Where?
A. At Mr. William James'.
Q. Did you examine the wound on him, or help handle the body?
A. I seen the wounds.
Q. Where were they?

354 A. One of them was a slight one on his left shoulder, a bullet hole in his neck, and it seemed that the ball ranged through his neck and broken into the jaw.

Q. On which side?

A. Left side.

Q. Shot in the left shoulder?

A. Yes, sir.

Q. And the ball went through to the right jaw?

A. Yes, sir; ranged through the neck unto the right jaw.

Q. Where was the other one?

A. The other was in the front just about an inch or so below his navel and ranged out to the side of his back.

Q. Where did it enter?

A. It entered from the front.

Q. Tell the jury how you know that?

A. Why, the hole in front was about the size of the end of your finger and behind it was a large one, nearly as large as your thumb. You could near put your thumb in the wound. It was the largest of the two. It was nearly twice as large as the one in front.

Q. You helped to dress him, and examined him closely, did you?

A. Yes, sir.

Q. Were there any other wounds on him?

A. No other wounds that I seen.

Q. How long were you there?

A. I was there something about the space of an hour.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Was Wesley McCoy there?

A. I don't know him by that name. Probably I know his face.

Q. What is your business?

A. Cooking.

355 Q. Where?

A. Well, I have cooked in Checotah. I was cooking in Checotah during that time. I have cooked also in Muskogee.

Q. Are you a citizen up there?

A. No, sir; no more than my father. He is by marriage.

Q. Your mother, then, is an Indian?

A. My stepmother is.

Q. How long have you lived in there?

A. For the last 11 years.

Q. Have you been arrested for anything up there?

A. Yes, sir; at Muskogee for fighting.

Q. Anything else?

A. No, sir.

Q. Nothing else but fighting?

A. Yes, sir; I have been arrested for gambling.

Q. Are you a gambler?

A. No, sir; not by profession.

Q. You gamble on the side, do you?

A. Sometimes I do.

A JUROR. I wish you would show where the ball struck; stand up.

A. It struck him here in the front and ranged a little to the left, I think, a li'tle to the left side of his back.

Q. Higher up or lower down?

A. I could not say whether it was higher up or lower down, but I know it was to the left of his back.

Q. How far from the backbone?

A. It was about the space of an inch and a half.

Q. It was above his hip, I suppose?

A. Yes, sir.

Q. And below the navel?

A. Yes, sir.

Q. You helped dress him?

A. No, sir; I wasn't helping dress him at all. I was helping the doctor dress the wounds and change him from one bed to another.

Q. How long was that after the killing?

A. The next morning after the shooting.

356 Q. Did he have any arms on him?

A. No, sir; none that I saw.

Q. He had no pistol?

A. No, sir; not at that time.

Mr. THOMAS MARCUM (of counsel for defendant). What doctor attended on him?

A. Dr. Simms.

A JUROR. How long did he live?

A. I don't know, sir. I think he died the next day afterwards. I think he lived three days, to my rem'brance. I think he died the next day after I helped handle him.

Q. When you were over there he was still alive, was he?

A. Yes, sir.

(Witness excused.)

357 DAVE ROBERTS, having been duly sworn upon behalf of the defendant, was examined in chief by Thomas Marcum, esq., and testified as follows:

Q. Your name is Dave Roberts?

A. Yes, sir.

Q. Do you know the defendant here?

A. Yes, sir.

Q. Did you know John Welch in his life time?

A. Yes, sir.

Q. How long had you known Welch before he died?

A. Oh, I had been knowing him, I guess, for about 15 years.

Q. I will ask you to state if you ever heard him make any threats against the life of Charley Smith, the defendant?

A. Yes, sir.

Q. What were they?

A. Before the killing, he asked me one night at the fair who was Charley Smith dancing with, and I told him he was dancing with his wife, and he said to me, he says, "I will kill Charley Smith before this fair is over."

Q. Did you ever tell Charley Smith about it?

A. Yes, sir.

Q. Do you know Dave Harrison, the witness who testified on behalf of the Government here?

A. Yes, sir.

Q. Do you know what relation, if any, he was to Bob Marshal?

A. Bob Marshal's brother-in-law.

Q. Did you see him shortly after the killing of Marshal?

A. Yes, sir; I seen him the same day, on Thursday.

Q. Where did you see him?

A. I met him about 10 or 12 miles from Muskogee.

Q. Did he say anything to you about the killing?

A. Yes, sir.

Q. Tell what he said.

A. I asked him how was the fair, and he said, "Rough, rough,"
358 and he said that Charley Smith had killed Robert Marshal and John Welch. He said it wasn't any more than what he would have done. He said Robert come running up on his horse and shot at Charley Smith, and Charley whirled around and shot him. He said that that was no more than what he would have done.

Q. What size man was Welch?

A. He was a large man. I could not tell you exactly what size he was?

Q. I will ask you if you know whether or not he was a very strong man, stout man.

A. Yes, sir.

Q. What do you know about that?

A. Well, I—one time a fellow that lived in Tulsa, a marshal, I can't think of his name now, and him and Welch had a row in Tulsa there, and he knocked him down twice just as fast as he could get up, just with his fist.

The ASSISTANT DISTRICT ATTORNEY. I submit that is not competent.

Mr. C. J. FREDERICK (of counsel for defendant). I asked him if he knew about the strength of John Welch, and he went on to tell about having seen him knock a man down so often, was why he knew he was a strong man. Of course, I didn't ask him about that.

The COURT. It seems to me that that is too remote. The man he knocked down might have been very weak.

Mr. C. J. FREDERICK (of counsel for defendant). About the time, or just before, do you know anything about the strength of John Welch?

A. I could not tell you anything about his strength. I never had any scuffle with him.

Q. I will ask you if you knew his general reputation as being a desperate, overbearing, and lawless man? How he was generally regarded there? What the people said about him?

A. Well, I don't know that.

359 Q. The COURT. Do you know how the people generally regarded him, as being a lawless and desperate man?

A. Bad.

Q. Do you know how they regarded him?

A. Yes, sir.

Q. What did you answer you didn't know for?

A. Well, I understood him to mean if I knew myself, in myself?

Q. You say it was bad?

A. Yes, sir.

A. It struck him here in the front and ranged a little to the left, I think, a li'tle to the left side of his back.

Q. Higher up or lower down?

A. I could not say whether it was higher up or lower down, but I know it was to the left of his back.

Q. How far from the backbone?

A. It was about the space of an inch and a half.

Q. It was above his hip, I suppose?

A. Yes, sir.

Q. And below the navel?

A. Yes, sir.

Q. You helped dress him?

A. No, sir; I wasn't helping dress him at all. I was helping the doctor dress the wounds and change him from one bed to another.

Q. How long was that after the killing?

A. The next morning after the shooting.

356 Q. Did he have any arms on him?

A. No, sir; none that I saw.

Q. He had no pistol?

A. No, sir; not at that time.

Mr. THOMAS MARCUM (of counsel for defendant). What doctor attended on him?

A. Dr. Simms.

A JUROR. How long did he live?

A. I don't know, sir. I think he died the next day afterwards. I think he lived three days, to my rem'brance. I think he died the next day after I helped handle him.

Q. When you were over there he was still alive, was he?

A. Yes, sir.

(Witness excused.)

357 DAVE ROBERTS, having been duly sworn upon behalf of the defendant, was examined in chief by Thomas Marcum, esq., and testified as follows:

Q. Your name is Dave Roberts?

A. Yes, sir.

Q. Do you know the defendant here?

A. Yes, sir.

Q. Did you know John Welch in his life time?

A. Yes, sir.

Q. How long had you known Welch before he died?

A. Oh, I had been knowing him, I guess, for about 15 years.

Q. I will ask you to state if you ever heard him make any threats against the life of Charley Smith, the defendant?

A. Yes, sir.

Q. What were they?

A. Before the killing, he asked me one night at the fair who was Charley Smith dancing with, and I told him he was dancing with his wife, and he said to me, he says, "I will kill Charley Smith before this fair is over."

Q. Did you ever tell Charley Smith about it?

A. Yes, sir.

Q. Do you know Dave Harrison, the witness who testified on behalf of the Government here?

A. Yes, sir.

Q. Do you know what relation, if any, he was to Bob Marshal?

A. Bob Marshal's brother-in-law.

Q. Did you see him shortly after the killing of Marshal?

A. Yes, sir; I seen him the same day, on Thursday.

Q. Where did you see him?

A. I met him about 10 or 12 miles from Muskogee.

Q. Did he say anything to you about the killing?

A. Yes, sir.

Q. Tell what he said.

A. I asked him how was the fair, and he said, "Rough, rough,"
358 and he said that Charley Smith had killed Robert Marshal and John Welch. He said it wasn't any more than what he would have done. He said Robert come running up on his horse and shot at Charley Smith, and Charley whirrled around and shot him. He said that that was no more than what he would have done.

Q. What size man was Welch?

A. He was a large man. I could not tell you exactly what size he was?

Q. I will ask you if you know whether or not he was a very strong man, stout man.

A. Yes, sir.

Q. What do you know about that?

A. Well, I—one time a fellow that lived in Tulsa, a marshal, I can't think of his name now, and him and Welch had a row in Tulsa there, and he knocked him down twice just as fast as he could get up, just with his fist.

The ASSISTANT DISTRICT ATTORNEY. I submit that is not competent.

Mr. C. J. FREDERICK (of counsel for defendant). I asked him if he knew about the strength of John Welch, and he went on to tell about having seen him knock a man down so often, was why he knew he was a strong man. Of course, I didn't ask him about that.

The COURT. It seems to me that that is too remote. The man he knocked down might have been very weak.

Mr. C. J. FREDERICK (of counsel for defendant). About the time, or just before, do you know anything about the strength of John Welch?

A. I could not tell you anything about his strength. I never had any scuffle with him.

Q. I will ask you if you knew his general reputation as being a desperate, overbearing, and lawless man? How he was generally regarded there? What the people said about him?

A. Well, I don't know that.

359 Q. The COURT. Do you know how the people generally regarded him, as being a lawless and desperate man?

A. Bad.

Q. Do you know how they regarded him?

A. Yes, sir.

Q. What did you answer you didn't know for?

A. Well, I understood him to mean if I knew myself, in myself?

Q. You say it was bad?

A. Yes, sir.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. You say the majority of the people, the people generally in the community there, regarded John Welch as a lawless and desperate man, on your oath, do you?

A. The majority?

Q. Yes, sir; what the people generally say, and that means a majority of them.

A. Yes, sir; bad.

Q. In what community are you talking about?

A. What do you mean by community?

Q. I mean what place. At Muskogee?

A. Yes, sir; at Muskogee.

Q. Do you live there?

A. Yes, sir.

Q. What do you do?

A. I farm.

Q. How far from Muskogee do you live?

A. I live about three quarters of a mile north.

Q. Are you a citizen there?

A. Yes, sir; of the Creek Nation.

Q. Have you ever been arrested for anything?

A. I was arrested and brought to Ft. Smith for whiskey.

Q. When?

A. It has been three or four years ago.

Q. How many times for whiskey?

A. Once.

Q. Where did you live before you went up there?

360 A. I was raised there, in Muskogee.

Q. You know all the people in Muskogee, don't you?

A. No, sir; I don't know them all.

Q. You know Dr. Bennett, don't you?

A. Yes, sir.

Q. And Mr. Turner?

A. Yes, sir.

Q. And Mr. Severs?

A. Yes, sir.

Q. They all live there, don't they?

A. Yes, sir.

Q. They are old citizens there, are they not?

A. Yes, sir.

Redirect examination by Mr. THOMAS MARCUM:

Q. What did they do with you when you were brought here for whiskey?

A. I came clear before the grand jury.

Q. Were you ever convicte' in any court of anything?

A. No, sir.

(Witness excused.)

361 ROSWELL MACKEY, being recalled by the defendant, was reexamined by Mr. Thomas Marcum, and testified as follows, to wit:

Question. How long did you know Welch?

Answer. About 17 or 18 years, I guess.

Q. Did you know his general character in the community where he lived for being a quarrelsome and overbearing man?

A. Yes, sir; he was quarrelsome.

The ASSISTANT DISTRICT ATTORNEY. I submit that is not the proper form in which to put the question.

The COURT. That alone is not competent.

Mr. C. J. FREDERICK (of counsel for defendant). We save an exception.

Mr. THOMAS MARCUM (of counsel for defendant). I will ask you if you know his general character in the community where he lives for being a dangerous man?

A. He would fight; I know that. That is all I know.

The COURT. That is not the way to answer the question.

Mr. THOMAS MARCUM (of counsel for defendant). Do you know how he is generally regarded in the community where he lives as to being a dangerous man?

A. Yes, sir; everybody is afraid of him.

Q. Do you know how the people regard him in that neighborhood for being a dangerous man?

A. They all take him to be a bad man, and he was quarrelsome.

Q. I asked you as to whether you knew his character or reputation for being a dangerous man?

A. Of course I know it.

Q. Is it good or bad?

A. Well, he is a bad man. He is pretty good sometimes, and then other times he wasn't.

362 Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. You only tell what you know yourself?

A. Yes, sir; just what I know.

Q. And not what anybody else says?

A. I am telling what I know.

Q. You are talking then from your own information, and not from what the people generally say?

A. No, sir; I am talking about what I know.

Q. I believe you admitted when you were in here before that you were a gambler?

A. No, sir.

Q. You were telling about bucking the wheel of fortune there?

A. I was doing that that day.

Redirect examination by Mr. THOMAS MARCUM:

Q. Did I understand you to say you didn't know what his general character was; how he was generally regarded as being a dangerous man; how the people generally regarded him in that neighborhood?

A. That is just the way he was.

Q. How did the people regard him?

A. Well, they regarded him as dangerous and overbearing.

The COURT. Do you know how the people generally regarded him?

A. Yes, sir; some of them. I don't know how all of them did, but just some of them.

(Witness excused.)

363 JIM SMITH, being recalled by the defendant, was re-examined by Thomas Marcum, esq., and testified as follows, to wit:

Question. How long did you know John Welch?

Answer. About fifteen years, I guess.

Q. Do you know his general character in his neighborhood where he lived there as to being a dangerous man—how the people regarded him generally in that neighborhood?

A. Yes, sir.

Q. Was it good or bad?

A. It was bad.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Murder and gambling is the only things, I believe, against you?

A. Yes, sir.

Mr. THOMAS MARCUM (of counsel for defendant). I object to that.

(Witness excused.)

364 ALEX. COATS, being recalled by the defendant, was reexamined by Thomas Marcum, esq., and testified as follows, to wit:

Question. How long did you know John Welch?

Answer. I have known him for about 8 years, I guess.

Q. Do you know his general character in the community there where he lived—that is, how the people regarded him for being a dangerous man?

A. Yes, sir.

Q. Was it good or bad?

A. Well, it was sort of fussy; his character boisterous.

Q. Do you know how he was regarded generally by the people in his neighborhood for being a dangerous man?

A. Yes, sir.

Q. Was it good or bad?

A. It is bad.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. You just mean he was sort of fussy?

A. Yes, sir; a fussy man.

Q. Where did you say you worked?

A. I work at home. I work at the hotel sometimes.

Q. What doing?

A. Table waiter. Stay at home in the winter.

Q. Who is the owner of that hotel there?

A. Mr. Adams.

Q. He lives in Muskogee?

A. Yes, sir.

Q. He is not here as a witness, is he?

A. No, sir.

Q. Turner is not here as a witness on character, is he—the Turner of the hardware store?

A. No, sir.

Q. Do you know Mr. Severes?

A. Yes, sir.

Q. And Mr. Martin, his manager, there?

A. Yes, sir.

365 Q. None of them are here, are they?

A. I have not seen them.

Q. About the only people you have heard talk about this man Welch are these gamblers and other people around there, aren't they?

A. Well, no, sir. I have heard people make remarks about him.

Q. You have sworn on your oath here that the people generally said so; that, of course, means the majority of the people, the best sentiment of the people, and the best judgment of the people, and that includes the people generally, and it necessarily means the greater body of the people, that they have said this man was of a dangerous and desperate character?

Mr. C. J. FREDERICK (of counsel for defendant). I object to the question, because he is stating what is a proposition of law, and the law does not require a majority of the better element of the people.

The ASSISTANT DISTRICT ATTORNEY. I will waive it. How old are you?

A. 21.

Redirect examination by Mr. THOMAS MARCUM:

Q. Turner and Severs and these white people do not associate with the colored people, do they?

A. No, sir.

The ASSISTANT DISTRICT ATTORNEY. But they know them, don't they?

A. Well, yes, they know some of them.

(Witness excused.)

366 ALFRED SHOAT, being recalled upon behalf of the defendant, was reexamined by Thomas Marcum, esq., and testified as follows, to wit:

Question. How long did you say you knew John Welch?

Answer. About 11 years.

Q. Did you know his general character in the community where he lived for being a dangerous man—I mean what the people generally say?

A. The people generally say he was a dangerous man; yes, sir.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. What business are you in up there?

A. I am a cook by profession.

Q. For whom do you cook there?

A. For Mary Robinson's restaurant.

Q. Who else did you ever cook for?

A. I cooked at the Langodn.

Q. The only thing, I believe, you admit there was against you was fighting and gambling?

A. Yes, sir; that is the only thing I was arrested for.

(Witness excused.)

367 Defense rests.

368 The Government then introduced in rebuttal the following witnesses:

Jim Woods, Frank Parke, Wesley McCoy, Jim Evans, who testified as follows:

369 *Testimony offered by the Government in rebuttal.*

FRANK PARKE, having been duly sworn by the Government in rebuttal, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Mr. C. J. FREDERICK (of counsel for defendant). We have no notice that Mr. Parke was to be used as a witness in this case.

The COURT. The court has always held that if a witness is offered in rebuttal he is competent without notice.

Mr. C. J. FREDERICK (of counsel for defendant). We object and except to his being used at all as a witness. The court rules against us?

The COURT. Yes, on the ground that the statement of the district attorney is that he offers him in rebuttal.

The ASSISTANT DISTRICT ATTORNEY. That is for what he is offered.

Mr. C. J. FREDERICK (of counsel for defendant). We save an exception.

The ASSISTANT DISTRICT ATTORNEY. You live here in Ft. Smith?

A. Yes, sir.

Q. Did you see the body of the man Welch after he was shot?

A. I saw it twice.

Q. I wish you would describe the wounds that were in his body, state where they entered the body and where they came out.

A. I saw it twice and examined it. I saw it three times, but the first time I was as far as from here to Col. Marcum from him lying on
370 the floor. That was out at the place where the shooting occurred, and they would not let me in. And the next time was just after they had gotten him home. He was on a cot and was on the front of the porch, and I arrived there a short while before the doctor did, and his shirt was either torn or off, I have forgotten which, and there was a bullet hole through his left shoulder here, and then through his neck, and apparently the ball was lodged in the cheek.

Mr. C. J. FREDERICK (of counsel for defendant). None of that is in rebuttal.

The ASSISTANT DISTRICT ATTORNEY. As to the hole that was through his body here, where did that ball enter, and where did it come out?

A. The ball entered on the left side, just above the point of the hip, and came out right in the center of the abdomen, about two or two and one-half inches below the navel, right on the point of the belly.

Q. What was the difference in the size of these holes, these two that went through the body?

A. The one in front was a good deal larger than the one in the back.

Cross-examination by Mr. C. J. FREDERICK:

Q. How come you to be examining about these things? You live in the city of Ft. Smith?

A. Yes, sir; but I was working then for the Muskogee Phœnix. On the day before the fair they telegraphed me to come up there to take charge of the daily they run during the fair. I went out to the grounds to see what I could learn about it, and wrote it up that day, and I could
371 not get to see the body, and I come back down town, and they told me they had just brought him home, and I went down to his house.

Q. You didn't want to write up the nature of the wound, did you? Is that what you wanted to do?

A. Yes, sir; where he was wounded and the nature of the wound.

Q. Did you want to get the character and nature of the wound, as to where the ball entered and whether it entered in the front or rear?

A. We always do.

Q. You go into those minute details?

A. Yes, sir; we would if we give a full account.

Q. Have you any knowledge of surgery?

A. No, sir; not much knowledge of surgery. I have assisted in several post-mortems.

Q. As a reporter of a newspaper?

A. Well, yes, or was there as that, and I have helped them cut and sew, and one thing and another.

Q. Did you report it in the Phœnix, the character of these wounds, and what you are testifying to here?

A. I think I did.

Q. That was printed in the paper, was it?

A. Yes, sir; I have a copy of the paper at home.

Q. We have a copy of it here. You went and looked at the hole above over the hip and under the navel, too, you say?

A. I didn't examine the wound un' ther navel as closely that time as I did afterwards when I went back after——

Q. Were there any physicians there?

A. Yes, sir; Dr. Simms came while I was there.

Q. Any other physicians attending?

A. I don't think there was.

Q. Did Dr. Simms call your attention to the wounds as to where
372 the ball probably entered, and where its exit was?

A. No, sir; he didn't call my attention to it. I had seen a dozen or more persons who were shot, and noticed them, and when the doctor came I spoke to him about the wound——

Q. You advised the doctor about it?

A. No, sir; I didn't advise him about it, but I asked him if I wasn't correct, and he said I was. I wanted to verify——

Q. Did you have an idea of being a witness in this case?

A. No, sir; I have been to the marshal a couple of times and asked him not to subpœna me.

Q. Now, in your report to the daily paper about these wounds, and this killing, did you say anything at all about the character of the wound, as to where the ball entered and where it came out?

A. Yes, sir.

Q. Didn't you in two different issues of the Muscogee Phœnix write up an account of it without saying anything at all about where the ball entered and where it came out, whether the man was shot in the back or front?

A. I looked at the paper at noon, and it shows I did.

Q. Shows that the ball entered behind and came out in front?

A. Yes, sir; just as I have stated.

Q. You looked at it, did you?

A. Yes, sir.

Q. Preparatory to being a witness? When were you summoned in this case?

A. Mr. McDonough told me this morning he would use me.

Q. When did you tell Mr. McDonough about it?

A. I thought the trial was over, and Mr. McDonough and Mr. Rutherford and I was sitting there talking——

373 Q. You are a reporter for the Evening News-Record, are you not?

A. I have charge of the weekly.

Q. That is your business in the court room here, is it not?

A. Yes, sir. We were talking about it in a joking manner, and I happened to make some allusion to it, and Mr. McDonough asked me if I saw the wounds.

Q. You saw Welch's wounds how often?

A. I saw them twice; once before he died, and once after.

Q. How close were you to him the first time, before he died, when you examined his wound?

A. I was right at his cot. I helped move his cot once or twice.

Q. Was the clothing off of him?

A. I have forgotten whether his shirt was off, all of it, or not. His arm was bare.

Q. I am not asking you about that wound. I am asking you about the wound in the front or rear.

A. The clothing wasn't off at that time.

Q. Then you could not make a very minute observation of the wound. Did you, at the time you were examining the wound when the clothing was not off make a minute examination of the wounds?

A. There was a couple of colored men there, and they pulled his pants down there, and when the doctor came we raised him up on one side——

Q. Is that the first time?

A. Yes, sir.

Q. And then you looked at the wound in the rear, and the one in front too, at that time?

A. That is, when the doctor examined him.

Q. That is the first time?

A. Yes, sir.

Q. Did you make another examination after that?

375 A. The morning after he died—he died at night—Jim Richardson sent for me to come down to his house——

Q. It is immaterial about that.

A. I just wanted to tell how I went there the second time.

Q. Did you make another examination after his death of these wounds?

A. I went in there and looked at them.

Q. Why did you, if you had already examined them before, examine them again?

A. I started to tell you. Jim Richardson——

Q. Jim Richardson has got nothing to do with it.

The COURT. He is telling you.

The WITNESS. I had started to Jim Richardson's, and I missed the way and I got down there to Welch's house, and Bynum Colbert was in he yard, and he asked me to come in——

Q. I don't want you to tel' that. I don't think that is competent. Why did you examine the wounds the second time if you had examined them before?

A. I generally go around to morgues and one place and another, that way, and examine bodies after they are dead.

Q. Did you examine the wounds with a view to becoming a witness in the case?

A. No, sir, I did not; for I have been approached twice by marshals that wanted 'o summon me, and I begged off.

Q. Did you make the publication in the Muskogee Phœnix, the paper you were reporter for, as to the kind of wounds, after the first examination and before the second examination?

A. Yes, sir.

Q. And then did you make another report to the paper?

A. No, sir; I didn't make but one report; that was on the day of the killing.

Q. The only report you made was on the day of the killing?

376 A. Yes, sir; as to the character of the wounds. Of course, I had in the other reports——

Q. Wasn't that done before the wound was examined?

A. No, sir. Col. Cravens was with me at the time Dr. Simms came.

Q. Have you ever been charged with any offense?

A. No, sir.

Q. Never been arrested?

A. No, sir.

Q. Never at all?

A. No, sir.

(Witness excused.)

377 WESLEY MCCOY, having been duly sworn upon behalf of the Government in rebuttal, was examined in chief by J. B. McDonough, esq., and testified as follows, to wit:

Question. Did you know John Welch?

Answer. No, sir; I didn't know him.

Mr. C. J. FREDERICK (of counsel for defendant). We haven't had any notice of this witness.

The ASSISTANT DISTRICT ATTORNEY. Oh yes, you have. Look at your papers. It is on the indictment there. [To the witness.] I will ask you if you saw the body of John Welch after he was shot?

A. Yes, sir.

Q. Before or after he died?

A. Before and after he died, too.

Q. Were you assisting in any way?
A. Yes, sir; I was helping to wait on him before he died; also helped to wash and dress him, and shroud him, and put him in his coffin.
Q. Now, as to the ball that went through the body, where did that ball enter, and where did it go out?
A. Well, he was shot in two places.
Q. Where was he shot?
A. He was shot in the point of the shoulder, and then the ball went in there somewhere, along there in his jaw.
Q. Where was he shot besides that?
A. There was another bullet hole back here, in his back.
Q. Where did that come out?
A. In front.
Q. What was the condition of them—what was the difference between them?
A. Well, it seemed to me like it was smaller in the back, the hole was, than it was in front.

378 Cross-examination by Mr. C. J. FREDERICK:

Q. Who told you that was the way to tell, by the size of the holes?
A. No one.
Q. How long have you been knowing that?
A. That was the first man I ever saw shot.
Q. You don't know where the ball went in, do you?
A. No, sir; but I was always told that where the ball goes in, it is smaller than where it goes out.
Q. Who told you that?
A. Lots of people have told me.
Q. Have you been talking with old man Newlin here about this?
A. I don't know him.
Q. And Richardson?
A. I don't know him.
Q. You looked at the wounds with a view to being a witness, didn't you?
A. No, sir; I didn't have no idea of being a witness at all.
Q. Have you ever been arrested for any crime?
A. No, sir.
Q. Where do you live?
A. At Brazil, Choctaw Nation.
Q. Are you a Choctaw?
A. Yes, sir.
Q. What were you doing at Muskogee?
A. I was up there during the fair.
Q. How old are you?
A. About 34 years old.
(Witness excused.)

379 JIM EVANS, having been duly sworn, was called by the Government in rebuttal and examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?

Answer. I have been living in Muskogee ever since the 11th of September last.

Q. Did you ever live here in Ft. Smith?

A. Yes, sir; I lived here about seven years.

Q. I will ask you if you were present at the time that Welch and Marshal were killed?

A. Yes, sir; I was there.

Q. I will ask you if you saw Welch during any time that Smith was shooting at him?

A. Yes, sir.

Q. State what he was doing.

Mr. C. J. FREDERICK (of counsel for defendant). This is not in rebuttal at all.

The ASSISTANT DISTRICT ATTORNEY. This witness has been served on you, and you can not make any point on that. Some of the witnesses introduced by the defense have testified that Welch at the time of the difficulty was advancing upon the defendant. I call this witness only on that point to show the contrary.

The COURT. That is rebuttal of the evidence of the defendant.

The ASSISTANT DISTRICT ATTORNEY. State what Welch was doing there while Smith was shooting at him.

A. As I came in the gate this man Smith was standing talking to some man, I reckon it must have been Newlin; I never learned his name until afterwards, and I had been playing for Charley, and I came in there. I slipped in the gate behind him while he was talking to this man, because I didn't want him to see me. I had been playing for him. I played
380 Tuesday night and Wednesday night.

Q. It does not matter about that. Go on.

A. When I got into the tent where I was going a man wanted me to play, and I would not do it, and he asked me why——

Q. You need not go into that.

A. After I heard the first shot I come and looked out, and the people commenced scattering away from there then and I could see who it was shooting, but at the first fire I didn't know who it was; I could not see, but at the second and third shots I could see who it was.

Q. What did you see?

A. I saw John Welch with his back to him, sorter going away from him, and he was shooting at him, just in that way.

Cross-examination by Mr. C. J. FREDERICK:

Q. Have you ever been arrested for anything?

A. No, sir.

Q. How old are you?

A. I am 42 years old.

Q. Do you live at Muskogee now?

A. Yes, sir.

Q. What do you follow?

A. I play music, cook, and train horses and dogs.

Q. You say you went into a tent?

A. Yes, sir.

Q. Whose tent?

A. It was a tent that a colored fellow was running there, and some white people was dancing in it.

Q. Where was that tent? You know where Charley's tent was, don't you?

A. Yes, sir.

Q. How far were you from the shooting?

A. About 25 or 30 yards.

381 Q. You were down below the flying jennie?

A. I was right opposite of it.

Q. Were you standing in the tent when you saw this shooting?

A. Yes, sir; when the first shot fired. I wasn" clear inside; I could see out.

Q. Were you inside?

A. Yes, sir.

Q. There was a little counter in front, wasn't there?

A. No, I was standing right in the side room, and one side of the tent was weatherboarded up to let people pass in and out tha' way, and I was close to the side where it was weatherboarded up.

(Witness excused.)

382 WILLIAM GENTRY, a witness for the defendant, among other questions, was asked the following:

Q. What size man was John Welch?

A. He was a pretty big-sized man. A man I guess would weigh about 185 pounds.

Q. Do you know whether he was a strong man or a weak man?

A. He was a pretty strong man, well built.

Q. Do you know his character there in that community for being overbearing?

The COURT. There is nothing yet offered to let in that character.

Mr. MARCUM (of counsel for defendant). All right. Will I be permited to show his character for strength?

The ASSISTANT DISTRICT ATTORNEY. I suppose that is incompetent at this stage. I didn't object to it awhile ago because I didn't think it amounted to anything.

The COURT. It is in already. It is unnecessary to repeat it. It is not competent, though.

Mr. MARCUM (of counsel for defendant). I didn't ask as to his character as to strength.

The COURT. I don't think you can prove that anyway.

Mr. C. J. FREDERICK (of counsel for defendant). I understand it is always competent to prove the relative strength of the two combatants.

The COURT. That depends on the condition of the case. Up to this time it is shown there was a man unarmed, in the pursuit of his business, shot to death by this defendant. What difference does it make how strong and large he may have been? Up to this time the defendant stands in the attitude of having committed a forcible trespass on this man, cut

383 his reins, raised a disturbance there, commenced a difficulty, precipitated an affray, did that which might lead to a deadly result,

and there is nothing at all shown so far that John Welch was armed or that he made any demonstration of any kind. It would be clearly incompetent.

Mr. C. J. FREDERICK (of counsel for defendant). It wasn't the reins of the deceased that were cut. It was the reins of another person.

The COURT. It don't make any difference. If it was a thing that would likely precipitate a conflict, a wrong done by the defendant, something that he had no right to do——

Mr. C. J. FREDERICK (of counsel for defendant). That wasn't as between the defendant and deceased. We except to the ruling of the court.

The COURT. Yes.

(These were all the questions that were asked, and the answers that were given, and the exceptions that were saved upon the points embraced in the questions put to William Gentry upon the subject-matter set out above.)

JAMES SMITH, a witness for the defendant, upon redirect examination, among other things was asked the following questions, and made the following answers:

Mr. THOMAS MARCUM (of counsel for defendant). How long had you known John Welch?

A. For about fifteen or twenty years.

Q. I don't know whether the court will permit you to answer or not, but I will ask you if you know what his habit was with reference to carrying a pistol?

The COURT. That is not competent. That is too remote.

Mr. C. J. FREDERICK (of counsel for defendant). We offer to ask the question and object to the ruling of the court.

384 The COURT. Yes; the court does not permit it to be answered because it is too remote. You must ascertain whether he was carrying a pistol at that time or not.

The ASSISTANT DISTRICT ATTORNEY. There is not a single witness states that he was carrying a pistol.

Mr. THOMAS MARCUM (of counsel for defendant). I will ask you if you know whether he had a pistol?

A. Yes, sir; he had a pistol.

Q. How long had he had a pistol?

The ASSISTANT DISTRICT ATTORNEY. Do you mean right then and there?

The WITNESS. I don't know at that particular time.

The ASSISTANT DISTRICT ATTORNEY. I submit that is not competent.

The COURT. No; that does not make any difference unless he had it on his person or in his hand.

Mr. C. J. FREDERICK (of counsel for defendant). If it was known to the defendant that he was carrying a pistol——

The COURT. You haven't shown that. We can not see what the defendant knew from anything that has transpired yet.

Mr. C. J. FREDERICK (of counsel for defendant). We can show what the habit was——

The COURT. No; no reasonable man has a right to infer that another has a pistol in his hand because he is holding his hand down. That is not a reasonable inference.

Mr. C. J. FREDERICK (of counsel for defendant). We save an exception.

The COURT. Yes.

Mr. THOMAS MARCUM (of counsel for defendant). Will the court allow us to ask the witness now as to Welch's strength?

The COURT. No; I don't see that it cuts any figure.

(Witness excused.)

This embraces all of the evidence of Smith bearing upon the points indicated by the character of the question asked, and the answers made thereto.

385 The witness, FRANK PARK, was then permitted to testify over the defendant's objection (which objection the court overruled, because his evidence was in rebuttal, and it was not necessary to give the name of the witness to the defendant in such a case) as follows:

Do you live here in Fort Smith?

A. Yes, sir.

Q. Did you see the body of the man Welch after he was shot?

A. I saw it twice.

Q. I wish you would describe the wounds that were in his body. State where they entered the body and where they came out.

A. I saw it twice and examined it, but the first time I was as far from here to Col. Marcum from him lying on the floor. That was out at the place where the shooting occurred, and they would not let me in; and the next time was just after they had gotten him home. He was on a cot and was on the front of the porch, and I arrived there a short while before the doctor came, and his shirt was either torn, or off, I have forgotten which, and there was a bullet hole between his left shoulder here, and then through his neck, and apparently the ball was lodged in the cheek.

Q. As to the hole that was through his body, here. Where did that ball enter, and where did it come out?

A. The ball entered on the left side just above the point of the hip, and came out right in the center of the abdomen about two or two and one-half inches above the navel, right on the point of the belly.

Q. What was the difference in the size of these holes, these two that went through the body?

A. The one in front was a good deal larger than the one in the back?

The court then charged the jury as follows:

386 *Charge of the court, delivered February 20th, A. D. 1895.*

PARKER, J.:

Gentlemen, the defendant, Charles Smith, stands before you charged with two murders, and it becomes your duty to pass upon the guilt or innocence of the defendant of both of these alleged crimes. In order to do that intelligently you must have the truth of the case as best you can find it, and you only can obtain that, as you know, from the testimony, which is

the only practicable method of reproducing an occurrence. When you get that truth you are then to find out by the law whether that true state of case makes a crime as prescribed by the law. If it does not, the defendant is innocent; if it does, he is guilty. The only method we have of imparting the law to the juries of the country is through the courts as an agency for that purpose. You take these principles of the law, the one defining the crime, or defining in this case the right of self-defense, and you make an application of whichever one of them is applicable to the facts
387 as you find them. In that way you observe the terms of the oath which you have taken upon yourselves when you said you would try the case according to the law and the evidence. Now, the first charge here is one growing out of the killing of John Welch by the defendant. The second charge, as contained in the other indictment (the indictments having been consolidated for the purposes of trial), is a charge growing out of the killing by the defendant of Robert Marshal, alleged in the indictment to have been an officer at the time he was killed. And in that connection I call your attention to the fact that you will confine your investigation to the second count of that indictment, where it is alleged that he was an Indian policeman at the time he was killed.

This charge for the killing of John Welch is one of murder, for the indictment alleges that the defendant, Charles Smith, by shooting him with a pistol, willfully and with malice aforethought took the life of John Welch, alleged in the indictment to be a negro and not an Indian. This is a fact necessary to give the court jurisdiction. If the proof shows that he was a negro, a colored man, belonging to that race, notwithstanding it may show that he married a Creek Indian woman, the court tells you that it has jurisdiction to try this case. You, in connection with the court, have a right, under the law, to hear and determine the case upon its merits, because a marriage to a Creek Indian woman by a colored man does not, under their law, denationalize that man. He is a citizen of the United States; he is a jurisdictional citizen, and he does not become a citizen of the Creek country by virtue of such a marriage, as is the case with some of the other nations. Therefore, that is an unimportant fact in
388 the case, whether he was married or not. If the proof shows, according to the allegation in the indictment, that he was a negro, then you may pass upon the question of jurisdiction in favor of this court having jurisdiction, and put it aside as one that is established beyond a reasonable doubt.

Under this charge there are certain things you are required to find, and I will give them to you in detail and as briefly as possible. I do not hesitate to say that I do not believe that juries are ever encumbered by the length of charges of the court here, but complaints have been made elsewhere that they can not understand the charge because of its length, and not for your benefit, but for that reason I will try and shorten it as much as possible in order that it may be understood. Under this charge there are certain things necessary to be found. It must be found and proven to the degree of certainty that the law says is necessary to establish a fact before it can be regarded as established. You are to find, first, that John Welch, as I have already told you, was a negro, and not an Indian. You are required to find, secondly, that he is dead; and, thirdly, that he died because he was shot with a pistol. Now, that is an inferential fact. It is

one that is found by reasonable men; it may be found by men of common observation without the aid of expert testimony. You take a man's condition at the time he was shot, the character of the wounds inflicted upon him, the length of time he lived thereafter, and all these circumstances just as you usually take them to enable you to come to a conclusion of like character if an occurrence of that kind was presented to you outside of the jury box. Again, you are to find that the defendant, Charles
389 Smith, did the shooting with a pistol, which resulted in the death of John Welch. All of these propositions together go to make up this charge. Generally it is the case, as was remarked yesterday by Mr. Marcum in his argument, and truly remarked by him, that there was but a few propositions in a case, and that is generally the case, that a case turns upon a very few controverted propositions. None which have been named to you in this case, except, perhaps, it may be the assertion against the question of jurisdiction, are in controversy at all. They are not controverted. There is no controversy arising from them. If there was, the proof is of that character that would satisfy the minds of reasonable men, and they may be regarded as established. We are now coming to the propositions that are controverted, and propositions to which I invite your earnest attention, because it is your duty to find, first, if a crime has been committed. That is a solemn duty. It is a great duty, because upon it rests the safety of this great people, and especially upon its correct finding rests the protection to innocent human life that alone can be obtained under the law of this land. Not obtained under the law, because the law says that crime consists of certain things, and there it stops, but because the law with its mighty power is placed in the hands of the honest, intelligent, and brave people of this land with a determination to vindicate it, to uphold it, and to enforce it in every case where men have been robbed of their lives. Then the first great duty is to find if a crime has been committed. A duty equally as great, equally as important, is to find the character of that crime, because if you find that a crime has been committed, and misname it, say it is something else that it is not, you pervert the purpose of
390 the law, you falsify it, you trample it under foot, and you treat it in a way worse than you would treat it if you would find that no crime existed. It becomes then a mockery, a compromise with crime, the entering into concessions with crime, the entering into an arrangement by which you will find this thing to exist, though something else may really exist in the case. If there exists in this case murder, under the law, you can not escape, upon your consciences, and according to your duty, saying so, if that state of case is established as the law requires it to be established. If that does not exist, but something else does, you can not escape finding what does exist, and correctly find it. Now, to enable you to find what does exist, you are to look at these things that enter into the crime as characteristis of it, that go to make it, that go to show what it is. Now, what are they? To make the crime of murder the law says the killing shall be done willfully, and done with malice aforethought. And it says further that a killing done in this way has in it alone the crime of murder, the crime of murder alone, and nothing else. Now, we can not stop here, because these expressions have in the law a peculiar meaning; they have a meaning that the law attaches to them, and it is necessary that we should give them to you that you may understand them. And I remark to you

in this connection that the definition of the crime of murder, as given under this indictment, is the same as the crime of murder as charged in the indictment where it is alleged that Robert Marshal was killed by the defendant, and it becomes unnecessary to repeat it twice to you. One definition of these expressions would convey to you the intelligent meaning of
391 the law when it shows them, and a repetition of them is unnecessary.

There are some facts in connection with the killing of Robert Marshal that it is necessary to refer to that do not grow out of this case, or that really are not involved in this case. For instance, the fact that he was an officer, and had the rights of an officer; and the rights and duties of the defendant under the circumstances are to be considered. These things will be necessary to give to you. But we now proceed to give you the meaning of these expressions which enter into this crime. The word "willfully" must be defined to you; you must know the meaning of it as used in this connection, the meaning that the law attaches to it. The law says that "willfully" in this connection means "intentionally." If a man intentionally kills, he willfully kills. Further than that, if he intentionally does an act which produces death, he willfully does an act which produces death. And if he willfully does an act which results in death, because of the usual connection between an act of that kind and death, the law says he willfully kills. For instance, a man shoots at another, as in this case the defendant shot at John Welch, shot at him a number of times; now, you bring to bear upon these propositions, as you do upon all others, your common observation—not your experience, because the law does not contemplate that you are men who have had experience of things of that kind—but it contemplates that you, by your age, and from your powers of observation, are qualified to bring to bear, and it is your duty to bring to bear, your observations in this way, that you are qualified to a greater extent to pass upon the question as to whether, when there is a given state of facts presented before you, and proven before you, as to what the intent of the
392 party was as evidenced by these things. Let us bear in mind, in this connection, that when we come to this thing of mental process, what is in the mind of man, we can only know that condition by the character of the act done by him, or by the character of the acts done. That is the only way we can know it. There are methods of indicating this mental condition. One method is by words. A man, by going through a certain process, is able to speak, he is able to utter words, he is able to formulate and declare sentences. These are signs of what is passing in his mind; but he can do the same thing by an act. And when you see a man present a pistol at another, within shooting distance of him, and fire it at him, and fire it again, and fire it again at him, as sensible men, what conclusion do you come to as to what his purpose was? You know the character of the weapon, you know the distance apart the parties were, you know the results usually produced by an act of that kind, and all of these things are taken into consideration by you, it may be imperceptibly, but from an act of that kind you conclude, intelligently and correctly, that he who is doing that intends to take human life, and that is because you know, from your common observation, from the common wisdom possessed by gentlemen of your age and your intelligence, that an act of that kind usually does kill, or that it may probably, or naturally, or reasonably kill. In that connection there is an axiom of the

law that is to be observed by all men, and for the sake of human life, especially, it must be observed, and it is this: That every man of intelligence, who is sane, when he does a willful act is held by the law to have intended the natural or probable consequences done by him. If
393 death is produced by the natural or probable consequences of an act done by him, and done by him intentionally, and willfully, the law says he intended to kill because such killing, or death, is a result that is natural and probable from an act of that character. You now see it becomes an easy matter to see what is meant by that expression. When we say, in short form, that it means a killing that is willfully done, means one that is willfully done—the terms being synonomous, one meaning the same as the other—it becomes an easy matter to understand what is meant by that expression, and to find it in the natural and easy way that you find ordinary facts of importance. You take the manner of the shooting, the character of the weapon used, the very result produced by that weapon, and above all the repeated use of it upon the person killed, to see whether it was an accident, something that occurred after the defendant exercised that amount of care that the law says he shall exercise when he handles a dangerous weapon, and that it occurred beyond the exercise of that care, or whether it was done purposely, willfully, and intentionally by him. To see that, you see whether it was presented in the direction of John Welch; you see whether the trigger was pulled; you see what was done with that weapon, and how often it was used, to enable you to come to a conclusion as to whether this element exists in this case or not. Now, that is the first element of the crime of murder. What is the second and distinguishing trait? This one is possessed in common with manslaughter, a case of self-defense, and with murder—that is, that it is done willfully. A man is attacked in such a way as that, under the law, he can kill to prevent that attack. He does it will-
394 fully, as a matter of course, because the very fact that he comprehends the situation, the circumstances, shows that he did what is willful, and if he is guilty of voluntary manslaughter, the killing is a willful killing. But now we come to the distinguishing characteristic of this crime, that which distinguishes it from any other homicide, and it is known as malice aforethought. Now, that does not mean that a man has to set down and brood upon this purpose to kill for a month, or a year, or a day; it does not mean anything of the kind. I say to you that if you have a case of killing that is not justified under the law, as I will give it to you, and that is not mitigated as that, you may name it something else than murder. When you have a killing that is done willfully, done without just cause or excuse, or in the absence of mitigating facts—that is, facts that you are authorized to take into account to reduce the grade of that crime—you have a state of case that has in it malice aforethought, and the very condition which shows that it was done willfully, under such circumstances as I have named, shows that it is done with malice aforethought. You take the case where a man presents a pistol at another, and he fires it at him, and fires it again and again at him, and thus takes his life, I say if that be the case where he had no right to do that killing under the law of self-defense, as I will define it to you, or he could not assert under the law that that crime be reduced in grade from murder to manslaughter, because there are no mitigating facts in

it such as the law would regard as mitigating facts, the fact of his drawing and presenting and firing willfully the pistol under such circumstances shows the existence of malice aforethought. Why?
395 Because one of the definitions of malice aforethought, and as accurate a one as any other, is that it means the doing of a wrongful act which results in death, done without just cause or excuse, or in the absence of legal provocation or mitigating facts. Now, there are but three conditions that can grow out of the taking of a human life under the law of the United States, and it is by the process of elimination by a correct method that we frequently get at correct conclusions as to what is the truth of a case. If, after you have heard all the law that is given to you, and after having heard the evidence, as you have in this case, you conclude that this is not a case that is justified, you have one condition eliminated from the legal problem from the *equal* equation. Then again, on reviewing the case, if you conclude that it is not a case that stands before you by the light of this evidence and under the law as the case of manslaughter, you have eliminated a second factor from the legal equation, and there consequently remains but one in it, as there can be but three in it, and that is that the crime is murder, under the law; the doing of a wrongful act without just cause or excuse, or in the absence of mitigating facts which result in the death of John Welch. Now, I say that is one of the definitions of malice aforethought. It is defined again as an act which results in death that was willfully done, and done in such a wicked, wanton, and reckless way by he who did it as to show that he had a heart void of social duty, and a mind fatally bent upon mischief. What is meant by that? It is a forcible expression in itself, and not so easily understood as the other, but when we come for a moment to consider our duties, and our rights as citizens in a state of society, it is easily understood. We are to understand that we do not stand alone
396 in life, entitled to all the rights that could possibly belong to a person, and that nobody else has any. We all are equal before the law. We all stand upon the same plane precisely, and we are all entitled to equal rights. We are entitled, as long as we remain innocent of that which causes us to forfeit life—we are entitled to that high right that belongs to us, to the protection of life, because it is the greatest right, it is the most sacred right that belongs to us, and it belongs to every man until he does that for which in the interest of public justice his life must pay the forfeit, must pay the penalty. Now, as long as a man is in that condition he has a right to demand, as a duty to be executed or observed by all others, that the great right to life shall not be destroyed recklessly, wanton*a*lly, and without just cause or legal provocation, but that it shall be protected by all that power that is in the man and in the citizen. It is the duty of every citizen, not alone of an officer, but of every citizen, to protect an innocent human life from danger at the hands of another; and he who undertakes to afford that protection is not only doing what he has a right to do, but he is executing his duty, and he is to be commended for it instead of killed for it. Then, when a human life is destroyed in such a way as to show that he destroys it, forgets this great duty that devolves upon him to protect innocent human life, the law says that he has a heart void of social duty; he does not recognize it; he tramples that great social duty under foot by failing to recognize the right that

belongs to the individual citizen, and the very fact that he thus does this shows he has a mind fatally bent upon mischief. That is another
397 definition of this characteristic of the crime of murder, known as malice aforethought.

Now, I perhaps might stop here by having simply given you these two definitions, by expressing to you in these two different ways the precise and single idea that goes to define this characteristic of the crime of murder, but perhaps it may be prudent to go a little further in this direction, and tell you how other courts have defined this thing which is called malice aforethought. What I read to you now is especially read for the purpose of disabusing your minds of the fact that a man has to entertain this desire to kill, or this design to kill, for a given time; that he has to contemplate it for a stipulated period before you can find the existence of malice aforethought. The fact is, if he is armed with a deadly weapon, and contemplates a purpose to kill instantly with its execution, and if that purpose is one that he had no right to execute under the law of self-defense, or that because of the provocative conduct of the party killed he can ask that his crime be mitigated, the fact that he formed the design and executed it as a willful purpose, as a willful act done without just cause or excuse, or in the absence of mitigating facts, shows the existence of malice aforethought. He does not have to con over it, or contemplate it for a stipulated time. In his charge to the jury, Judge Lacombe, of the southern district of New York, in the case of the United States v. King, said:

"Malice means an intention to do bodily harm; a formed design to do mischief."

I might qualify that *my* saying an intention to do bodily harm that may result in death; a formed design to do mischief that may result in death.

398 "It has also been defined as a deliberate intent to kill. It does not necessarily import any especial malevolence towards the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit, a heart regardless of social duty, and deliberately bent on mischief."

A killing that is done in such a wicked and wanton way as to show that he who did it is reckless, wanton, and wicked, and that he had no regard for the fact as to whether another who possesses his right to life or not, has in it these characteristics that are to be taken into account by the jury in finding that it was done with malice aforethought.

"It imports premeditation."

Now we come to the definition of premeditation. What is meant by that? How long does a man have to think about this purpose to kill before it can be said that he premeditates upon it? "There must logically be a period of prior consideration, but as to the duration of that period no limit can be arbitrarily assigned. The time will vary as the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvelous rapidity. Men have sometimes seen the events of a lifetime pass in a few minutes before their mental vision. Thought is sometimes referred to as the very symbol of swiftness. There is no time so short but that within it the human mind can form a deliberate purpose to do an act, and if the intent to do mischief to another is thus formed as a deliberate intent, though after no

matter how short a period of reflection, it none the less is malice."
399 Malice in the old definitions is spoken of as expressed or implied. That definition is not just. It is a delusion and a snare. Practically, jurymen never deal with express malice. There is no express evidence of malice given to them. Malice, as I have told you, is an intent of the mind and heart.

"There is never presented to a jury direct evidence of what was the intent of the man's heart at the time. He is the only possible direct witness to that, and if he meant so to testify he would plead guilty. The existence or nonexistence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart and the processes of the mind are to us, or to anyone outside of the individual, exhibited by the acts which the individual performs, and we are entitled to infer what his intent was, and what were the processes of his mind and the feelings of his heart, by a careful study of the acts which he performs, and all the other external indications which he may have given of what his state of mind and heart was. As an eminent text writer has put it, there is no case of malicious homicide in which malice is not inferred from attendant circumstances, no case in which it is demonstrated as express. We have no power to ascertain the certain conditions of a man's heart. The best we can do is to infer his intent more or less satisfactorily from his acts. A person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result, is from our common experience presumed to have anticipated the result and to have intended it."

That is especially true when a man uses weapons that are per se deadly—weapons made for the purpose of taking human life;
400 weapons known to be of that character. Everybody is presumed by the law to know the character of the weapon that he uses, and the character of a weapon of a deadly nature; and everybody is presumed by the law to know that although that weapon is dangerous and deadly to the highest degree, that it will not use itself; it will not elevate itself in shooting position, and pull its own trigger, and send the hot, hissing ball through the vitals of the man shot at. It won't do that. It is an automaton; it is inanimate; it has no will power; and whenever will power acts upon it so as to command the one who uses it to take it up, and put it in shooting position, and pull the trigger, and pull it again and again, and destroys the man's life who is shot at, you have a state of case from the actions of the party, from his conduct, from his laying hold of the deadly weapon, from his use of it in that way, you have that which shows that he willfully and purposely produced death, and when you have that you make the further inquiry to ascertain whether he had a right to do that. If he had, that is the end of the case as to that. If he did not have, you make the inquiry to see whether or not the conduct of the party killed at the time of the killing was of that character that under the law that I will give you presently that he who kills can have his crime called manslaughter. If you find that condition you necessarily have from his willful use of the weapon in that way evidence of a contemplated purpose to do it, evidence of a premeditated design, evidence of a premeditated purpose to do an act which results in death, and you consequently have a state of case

that would show the existence of malice aforethought. A man who performs an act which he knows will produce a particular
401 result is from our common experience presumed to have anticipated that result and to have intended it. Therefore, we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, it is not necessary to prove that such design existed for any definite period before the fatal blow, because the execution of the design, the doing of the willful act, is evidence of premeditation, is evidence that it was thought of beforehand, is evidence that the deadly result was contemplated, bearing in mind that the party is held to have intended the result that may be produced by his willful or intelligent act. From the very fact of a blow being struck we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant. And thus we frequently find the statement laid down in reported cases, and by text writers, that malice is to be inferred from the use of a deadly weapon."

Now, I extend that, in the interest of defendants, so that you may the better understand it. Malice, he says, is to be inferred from the use of a deadly weapon. I make the declaration that where the proof shows the willful use of a deadly weapon, and shows that the party did not have a right to use it under the law so as to produce death, or that there was no other mitigating facts in the case, when that state of case is shown from the willful use of a deadly weapon, you have murder, and nothing else, as I have already told you. That is, in substance, the very proposition that I have told you. Now, the law was formerly declared to be that the proof which showed the killing showed murder, unless there was
402 something else offered; and by many courts that declaration is adhered to now. I say to you, if the proof shows that the killing was wrongful, was not justified, was not mitigated, the fact that it shows that it was done willfully shows it was murder; shows that it was done with malice aforethought.

"Proving the death, proving the slaying with a deadly weapon, and stopping there, we are warranted in inferring malice, and therefore find the crime to be murder, but it is very, very rarely that that is all the evidence in the case."

That is true. The simple fact of the killing of a man by sending a bullet through his body is not all the evidence, by any means, but from the state of facts which surround it, by the set of circumstances which go very largely to characterise the nature of the transaction, and which may be taken into account by the jury, to see, in other words, whether the killing was one that could be rightfully done under the law, or whether it was one that could be mitigated. The very surrounding circumstances are to be taken into account by the jury to show that. If they do show it, they take it out of the class of crimes named murder; if they do not show it, the killing belongs to that class.

"Your own experience, from what you have heard, and from what you have seen, must have instructed you that there is hardly ever a case"—he says, "I never have heard of one—where the only evidence proved against the defendant, or the only evidence proved in his favor, was the killing of the deceased with a deadly weapon. And the moment a single

other fact was admitted in the case this statement of the proposition becomes misleading, unless the jury bear in mind the caution which I have already given."

403 I have already given it to you. He says:

"Malice is to be inferred from all the facts in the case. If malice is found it must be frequently as an inference, from everything that is proved taken together and considered as a whole; every act, no matter how simple; every circumstance, no matter how trivial, which bears upon the question of malice must be considered by the jury at the same time that they consider the use of a deadly weapon, and it is only a conclusion from all of these facts and circumstances that malice is to be inferred, if inferred at all. To murder, the existence of malice is absolutely essential. If there is no malice, and if the homicide is not excusable, then it must be manslaughter."

Now, reading from the case of the United States v. Outerbridge, tried before Mr. Justice Field when he was sitting on the circuit bench of California, and who is now one of the associate justices of the Supreme Court of the United States:

"Malice is implied in every case of intentional homicide. That is to say, when once it is established that a person was intentionally killed, the law implies that malice existed in the party who caused the death. If there are any circumstances of excuse or palliation which will rebut the implication of malice, it is incumbent upon him to show them. The burden of proof rests upon him, for the law presumes that every person intends to produce the results which are the usual consequences of his acts. A man can not strike another violently with a bar of iron without inflicting bodily pain. If, therefore, he does thus strike another, the law presumes that he intended thus to inflict pain. The usual effect of

404 a leaden ball fired from a loaded pistol of the common size, at the distance of a few feet only, when striking the head or back of a person, is to kill such person. The law, therefore, presumes that every one who thus fires a loaded pistol within a few feet of the object intends to kill. It therefore implies malice in him."

If there are facts that go to extenuate the act, or go to justify it, of course they take away the presumption arising from the willful killing, but if the killing is done willfully—that is, if the act which produces the death is a willful act, and there is not in the case that which excuses it under the law of self-defense, or which reduces it to the grade of crime known as manslaughter, from the circumstances—as you have already been repeatedly told by the law I have read to you, and by my own statement of it—from the circumstances showing a willful killing, showing the willful selection and use of a deadly weapon, under such circumstances you have a state of case that shows malice aforethought.

Now, above all in this case it is important to look at the character of the shooting; to look at the manner of it, because there are characteristics attending the doing of an act done in self-defense entirely different, as a rule, from those done wantonally and wickedly and recklessly, in such a way as to show a wanton and reckless and wicked spirit. If a man is acting in self-defense, for example, when he has accomplished that defensive purpose he stops. He is conscious of it. The motive that prompts him to attack, then, is one of safety to himself. The one that prompts him to

act where he kills wickedly and recklessly is called a wicked motive,
405 which drives him on to destroy wantonly and wickedly, a human life. Therefore, I say it is highly important that the character of the act of the man should be seen as it exists; the very nature of the shooting; the very fact that it is repeated, and repeated, and repeated. When that transpires it is to be taken into account to show the frame of mind of the party who did the act as done.

I have now undertaken to give to you the definition of these two characteristics of the crime of murder. It is claimed for the defendant that there is no crime at all here, or if there is any crime, it is only manslaughter. That makes it necessary that I should define that crime. Voluntary manslaughter is a killing that is done willfully and unlawfully, but it is void of that wicked and wanton act as executed which shows the characteristic of the crime of murder known as malice aforethought. In fact, there must be an absence from the killing of malice aforethought; there must be an entire absence from the killing of that characteristic of the crime of murder, because if that is in it, it is taken out of the class of crimes known as manslaughter. The law says that manslaughter is the unlawful killing done willfully of another under such circumstances and in such a way as to show that it was not done with malice aforethought. That is manslaughter. Now, what sort of an occasion produces it? Can you kill another because of words used by him, and say that that is manslaughter? Not at all. The grade of crime is reduced because he who is killed at the time of the killing is doing some provocative act; some act that puts the mind of the party in such a condition that he is incapable of deliberation. That does not
mean if he works himself into a state of deadly frenzy, works himself
406 into a condition where he becomes reckless to human life, that he has a right to execute a wanton purpose, but it means that because of some act done by the party who is killed at the time of the killing, other than words used by him, that his mind is brought to a condition where he is not responsible for the act to the extent that it can be considered as a deliberate act, as one that is formed from a premeditated purpose, as that it grows out of a state of wantonness or wickedness upon his part. Now, the case where that usually arises is where it grows out of a conflict, or where it grows out of the case of the use of some great indignity, such as is sometimes taken into consideration by the law as a mitigating fact, and where it grows out of a conflict between the parties. The fact that one man may use words to another, opprobrious epithets, no matter how severe they may be, these are not mitigating facts, and they can not be taken into account to reduce the grade of the crime—these things alone—but it is something that must be higher than that, something that must be more effective than that, to put the mind of the party in a condition where it is incapacitated of deliberation, of premeditation. Now, the law says in defining it, referring to the class of cases where there is a conflict out of which this condition may arise, that voluntary manslaughter is the unlawful killing of another without malice, on sudden quarrel, or in the heat of passion. "Where upon sudden quarrel two persons fight, and one of them kills the other, this is voluntary manslaughter; and so if they upon such occasion go out and fight in a field,
for this is one continued act of passion. In this and such like
407 cases the law, kindly appreciating the infirmities of human nature, takes into account the provocative facts that exerted an influence

because of the conduct of the party killed—a state of case, for example, where one man has cut the reins of another and a third protests against it, and words follow between them, and because of these words one seizes a dead'y weapon and fires it, and fires it, and fires it again upon the person who thus protests or who may have used words against him—that is not a state of case that is mitigated; that is reduced in grade because of the conduct of the party, for the conduct of the party who is killed would not be of that provocative character that the law contemplates as sufficient to put his mind in that inflamed condition where his act occupies a midway position between a case that can be characterised by the law of self-defense as one that is excuseable and a case of murder. Now, that is what is meant by manslaughter. That is how the law defines it. It is for you to say what it is that exists in this case. But, again, it is claimed that there is no crime at all here; that you are called upon, then, to commend the act of the defendant, so far to commend it as to acquit him, because he has not violated the law. It is for you to say. You are the arbiters; you are the final judges on all of these propositions. That is why the position becomes so responsible that you assume. You are to say whether the law has been violated, and, if so, what the character of that violation is. You can only see it, of course, by the light of the law and by the light of the facts as they have illuminated the case. That makes it necessary that I should give you that provision of the law called the
408 law of self-defense, which says under certain circumstances a man may take human life, a man may destroy a human life, and be excused in doing it. If that is the case here, then the defendant is entitled to an acquittal at your hands. But let us see what that law is. There are two propositions that underly it. There are other propositions that are really involved in the language of the two that I give you, and it is necessary that you may understand them that they should be elaborated, and I call your attention especially to them. You will bear in mind in this case that the law of self-defense, which can be invoked by one citizen for his protection when he is taking human life, is a law that can only be invoked because of an act or apparent act done by the party slain at the time of the slaying. It can not be invoked against the use of words. It can not be invoked against threats made. It can not be invoked against lawless and desperate and dangerous character. If it could, it could be invoked in every case of murder in this court, because everybody is lawless and desperate who is killed, as you observe. It is a matter of common knowledge that goes to you, and you know it, in every case. Now, we are to take this law and see what it is, and to be governed by it. The first proposition that embraces a state of case that as far as this case is concerned, where at the time of the killing of the defendant—we are speaking now of the killing of John Welch; there are other propositions that it will be necessary to give you in connection with the killing of Robert Marshal—that in the case of the shooting of Welch by the defendant there was at the time of the shooting by the defendant either actual or apparent danger to him of death or of great violence coming from Welch,
409 and violence apparent or real that he could not turn aside, except by doing as he did do; that he had to do that to protect himself; that it was not a state of case when he could have escaped from it by the exercise of reasonable means, but it was a state of case where the

danger was danger to life or of great violence to his person, coming from John Welch; that he did not precipitate by his own wrong—that is, that the defendant did not precipitate by his own wrong, but that Welch created by his wrongful conduct, and that the defendant, in order to turn that aside, took the life of Welch.

Now, let us read what the law defining the right is in the hands of the citizen to take life. First, "A man who is in the lawful pur'uit of his business"—that is, he is doing what he had a rig't to do under the law at the time. That is the first thing that must exist. "A man who is in the lawful pursuit of his business is attacked by another under circumstances which denote an intention to take away his life." The attack must be of a certain character; it must have been the kind to indicate a purpose upon the part of Welch to take away the life of the defendant or to do him great violence—to do him some enormous bodily harm. Now, if that state of case exists, the law says he may have lawfully killed John Welch, provided he used all the means in his power otherwise to save his own life, such as retreating as far as he could, or disabling his adversary without killing him, if it be in his power. The proposition is very simple and very easily understood. It is very brief. The cardinal principle underlying it is that he must have been in the right himself; he must have been doing what he had a right to do. If he was doing that which contributed to produce an act of violence between himself and Welch, or between himself and anybody else at the time, which might lead to
410 a deadly result, that might bring about a deadly affray, he was in the wrong; he was not in the rig't. If that state of case exists that he was in the right, doing what he had a right to do, and was attacked by Welch in such a way as to indicate from the character of that attack a purpose upon the part of Welch to take his life, or to do him great violence, he could kill Welch, provided he could not by the exercise of any other reasonable means save his life. That is the statement of the proposition of what is called real danger, in short form. It means that the danger was danger to life, or of great violence to his person; that it then and there confronted him, and that he could not escape from it; danger that was then and there impending over him, and that he could only turn aside by striking, and striking to the death, the man from whom that danger came. If there was not any danger coming from Welch of that character, then this proposition passes out of the case; but there is still another one in it—still another proposition in it—and it is very necessary that you should examine that one with the same scrutiny, the same care, that you should know and remember the one I have given you, because it is a proposition that is sometimes very misleading to jurors. And it is sometimes misleading to lawyers. It is sometimes deceptive in its character from the way it is stated and the way it is made up. It does not mean that if I think I can kill a man that I can kill him and come into court of justice and I will be excused for it. It does not mean that if I think I could kill a man at the time, and kill him, and then come in and invoke the law of apparent danger, and stand upon it as a defensive proposition. It does not mean that. If it did, there would be no law; it would be a nullity, because you, and I,
411 and every one who has arrived at the years of discretion, and knows anything, knows that every man when he comes to trial would

think that he had a right to kill, that he might say that and honestly think it. The judgment of such a man is not to determine the proposition. There must be something behind that judgment. There must be something occurring, in the language of the law that I will give you in a moment, which you can pass upon, which you can set in judgment upon as the final arbiters, to see not that he may have thought so, but whether he had reasonable grounds to think so as evidenced by the facts and circumstances, situated as he was, surrounded as he was. That is the proposition. That is the law. Let us see whether it is or not. "When, from the nature of the attack"—that means there was some act of violence or apparent violence about to be executed, or being executed, by the party slain. "When, from the nature of the attack"—that is the pivotal point that we are to look to to form a judgment as to whether there was reasonable grounds to enable the defendant to form a conclusion, situated as he was, that the danger to life, or of great bodily harm, apparently existed. "When, from the nature of the attack, there is reasonable grounds to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excuseable homicide, although it should afterwards appear that no felony was intended." Now, you might sensibly ask, in this connection, what is meant by "when, from the nature of the attack." Can one upon his bare conception of a case act upon it, and say that he had a right to kill? Not at all. There must be something upon which his judgment is based. The law gives you that
412 something when it says from the nature of the attack, from the character of the act done as done by the party at the time he is killed, it being an act which is apparently an act of violence, though it may not be so; it may turn out not to be so, but it must be an act that is apparently an act of violence, and of bodily violence, of violence that would inflict great bodily harm upon another.

Now, let us see whether that is true or not. This proposition has been passed upon a great many times by the courts of the country; the definition of apparent danger has been again and again given by courts that juries may not misunderstand it, and that they who administer the law may not misunderstand it. About the best illustration of what is required to enable a party to assert that apparent danger existed is, in my judgment, set out in the case of Evans v. The State, passed upon by the supreme court of Mississippi, where in clear, concise, comprehensive, and easily understood language the eminent jurist who declared it laid down what was called the law of apparent danger upon which one might stand and act in a defensive way. Now, what does the court say in that case?

"To shoot down another on sight, and who at the time is making no hostile demonstration towards life or limb"—now, it becomes necessary to make that application right here to see whether John Welch was making any hostile demonstration towards the life or limb at the time he was killed—"and especially if not prepared and armed so to do, is in law murder. It is murder because the law tolerates no justification and accepts
no excuse for the destruction of a human life on the plea of
413 self-defense except that the death of the adversary was necessary, or apparently so, to save his own life, or his person from great bodily injury, and there shall be imminent danger of such design being accomplished. The danger to life or of great personal injury must be

imminent, present at the time of the killing, really or apparently, and so urgent that there is no reasonable mode of escape except to take life. When we use the term 'apparent'—'apparent danger'—we mean such overt "—that means something that can be reproduced before you to enable you to judge as to whether the defendant, situated as he was, had reasonable grounds to apprehend danger to his life, or of great violence to his person; some overt act, some outward act, that can be reproduced before the jury—"we mean such overt, actual demonstration by conduct and acts of a design to take life, or to do some great personal injury, as would make the killing apparently necessary to self-preservation."

Now, the best way to learn truths, in my judgment, is by illustration—the very best way. We can state an abstract proposition, and it may escape our minds, but when we come to some illustration which springs up before us still more forcibly, we can see precisely what is meant by the abstract proposition. You may declare to a jury of intelligent, honest gentlemen, men searching after the truth, a declaration of the law without illustration, and it may escape them, they may forget it in the attempt to remember the many things that come in a case during the trial, but when it is fortified by an illustration, when it is brought out and shown more clearly by that method, we can the better understand it. Now, this judge gives an illustration to show exactly what is meant by apparent
414 danger: As, if A, who had threatened the life of B, presented at him a gun in shooting posture, and within range, B might well anticipate the fire, and if he should kill A he would be justified, although it turned out afterwards that the gun was not loaded, and it was only intended to frighten him. Here was an act done which was apparently dangerous to life in the execution of a threat. This serves to illustrate what is meant by apparent danger.

Now, this apparent danger can not grow out of a state of bare fear. If I fear that a man may take my life, and he is not making any demonstration indicative of that kind, I cannot act upon that fear and say that there is danger. If that was the law, what would be the use of asserting the law in any case? But let us see a little further upon that proposition.

"But a bare fear of any of these offenses (murder, robbery, and the like), however well grounded, as that another lies in wait to take away the party's life, unaccompanied with any overt act indicative of such an intention, will not warrant him in killing that other by way of prevention; there must be an actual danger at the time," or there must be apparent danger such as I have defined to you as stating the law of apparent danger.

Now this is the law of self-defence, but a little further upon that.

"When one without fault is attacked by another, under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, the assailed may safely act upon the appearances and kill
415 the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justified, although it may afterwards turn out that the appearances were false, and that there was not in fact either design to do him serious injury, or danger that it would be done."

A little further upon that subject. The Supreme Court of the United States has had before it a case involving this very proposition, and they have passed upon it, or at least authorities were collected and collated by the judge who dissented in the case, and the authorities collected from all the courts of the country show that the principle is thoroughly established that a person can not act upon a state of bare fear; that there must be something else than that which gives him the right to slay, and say that his slaying was justifiable; that he could not kill, and say that because he thought he had a right to kill that therefore it is excusable.

"Unless the party has reasonable ground of apprehension at the time, the justification will fail; it being settled law that a bare fear, unaccompanied by any overt act indicative of the supposed intention, will not warrant the party entertaining such fears in killing the other party by way of precaution, if there be no actual danger at the time."

Now, to make an application of this principle we are to go to the evidence to see whether at the time of the killing there was anything being done by the party killed in this case to indicate from the character of that act, from the way he was doing it, a purpose to take the life of the defendant. If he was doing anything of that kind, although that may not have been his intention, the party who did the killing could take
416 the act and from it form a conclusion; but you are to see whether any act of that kind existed. If it did not, then it becomes a state of bare fear upon his part.

Again:

"Remarks already made are sufficient to show that a bare fear of danger to life, unaccompanied by any overt act or manifestation indicative of a felonious intent to that effect, will not justify the person entertaining such fears in killing the supposed assailant. Such a defence is not made out, unless all the conditions of the proposition before explained concur in the immediate circumstances which attend the act of homicide."

"When one without fault is attacked by another, under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life, or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, the assailed may safely act upon the appearances and kill the assailant, if that be necessary to avoid the apprehended danger, and the killing will be justified, although it may afterwards turn out that the appearances were false and that there was not, in fact, either design to do him serious injury, or danger that it would be done."

Now, what are the propositions underlying this one? There must be reasonable ground for apprehending the design to take his life, or to do him great bodily harm, and if that belief does not exist, if there is no reasonable grounds of that character, the law of apparent danger as a law of justification passes out of the case.

417 In this case it is claimed, and evidence has been offered to show that the deceased, John Welch, made threats against the life of this defendant. Not only that, but it is accompanied by the proposition that he was a man of lawless and reckless and dangerous character. It becomes necessary, therefore, that the court should take up sufficient of your time to tell you what figure these propositions cut in the case, provided you believe they are established. But that is the first thing you are to pass

upon. And in seeing whether they are established or not you are to consider the source from which the evidence comes; the very character of the witnesses as disclosed by themselves. If these allegations of threats made against the defendant come from men who are entitled to credit, you are to believe them and apply them, provided there is a state of case where you can apply them. But if they come from men who appear before you as confessed criminals, as men who are confessed fakirs, gamblers, introducers of whiskey into that country, and guilty of crimes, you have a right to take all these things into account in passing upon the credibility of the evidence, because evidence to be believed must come through a pure source. If a man says he has been seared by confessed crime, if he has been a violator of the law, you are to take that fact into consideration in passing upon his evidence, because you are entitled to his past life, to know his past life, to enable you to see whether he is making a true statement or not. You are to take into consideration the further fact that it becomes easy to assert a threat that can not be contradicted. A man swears to you that A made threats against B when nobody was present; A is in his grave, dead, and can not deny them; and it becomes an easy method of defense, often resorted to in this tribunal, often
418 applied, and you are with care, with scrutiny, and diligence to look at the character of the men from whom such declarations come, to see whether they are of the character that in your judgment as fair-minded men, as men of uprightness and having consciences, of pure hearts, can rely upon these statements. If you can not, cast them aside as so much stuff invoked for a purpose in the case. And the same with reference to character. It becomes easy to assert that a man is a man of lawless and desperate character when he is in his grave and can not refute that imputation; he can not resent it; he is gone; nobody to speak for him. And upon that proposition, as in the other, you are to see that the source through which these declarations come is a source of such purity that you can depend upon it as being true. Now, what is reputation? It is the reflection of character. Character is the thing itself. It is that which a man makes day after day, and hour after hour, and year after year, by his bearing and conduct in the community where he lives. If that thing is reflected by the words spoken by men of credit, by men of standing, by men of such character standing before you, that such reputation is so reflected as that you can believe it, of course it is entitled to consideration, and to be taken in the case if it is applicable. But it is to come from men who are morally and mentally competent to know what it means. If a man is a man without character himself, if his action has been characterised by crime, if his conscience has been seared by criminal conduct, he is thus rendered incompetent to know what character is. He has none himself, and he is incompetent to determine when other men have one. And, above all,
419 it is necessary, important, and essential to the interests of public justice that that justice should not be defeated by men of that character scraped from the four corners of the earth. You are to see to it that it comes from a pure source; and then again you are to see to it that it is the reflection not by keepers of dives and gambling hells, and violators of laws, and prison convicts, but it is the reflection of honest and conscientious men, of men who possess character themselves; men of integrity; men whose judgments make up in your community your char-

acter that you prize so highly because it is the opinion of honest, intelligent, judicious, and just men and women in your community. That is the source that character is to come from, and the only source from which you can derive it in a reliable way. If it does not come from that source, but comes from the source I have designated, cast it aside as so much worthless matter invoked wrongfully in cases of this character. Now, provided you believe that these two characteristics known as lawless and desperate character, and deadly and violent threats against the defendant, are established because they come from the source I have named, then you are to see what application is to be made of these conditions. You naturally inquire in this connection if a man can be killed because he is a man of bad character. Not at all. It would never do to leave that to the judgment of defendant, or anybody else, because they would be mistaken about it; they would come to a wrong conclusion. There would be too many men killed upon that ground. What is the rule? When can character cut a figue in the case? I might ask in this connection, as you would naturally ask, whether a man can be killed because of threats made against another?

Not at all. If so, the law of assassination is one easy of appli-
420 cation: A wants B kil'ed, and he goes and tells C that B has made violent threats against him, and C kills B, and then comes into court and asks to be excused for it, and if that was the law he could be excused; yet it might turn out afterwards that B never made any threats at all, and A, being an assassin at heart and a coward besides, being anxious to have B killed, he gets an innocent man to do it by telling him a falsehood. The law does not deal in any such trickery as that. The law does not lay down any such proposition as that. The law is just in all of its provisions. I now will give to you what state of case must exist where previous character of the kind I have named, or threats of a deadly nature, or of great violence to the defendant in this case, can be considered by you. If you are satisfied beyond a reasonable doubt of the status of these parties at the time of the killing, from the evidence of the eyewitnesses, men who saw the occurrence—I say, if you are satisfied of that, then uncommunicated threats can not be taken into account, can not come into the case because it is established. They are only illustrative facts; uncommunicated threats, or lawless and desperate character unknown to the defendant can be only taken into account where there is a question in the minds of the jury as to what the status of the parties was at the time of the killing. If that status was seen and described by eyewitnesses who are credible and reliable, then these uncommunicated threats are not to be considered by you. But if there is a question upon that point, you may consider them as illustrating the occurrence at the time. Now, that is the figure that threats uncommunicated cut, or lawless and desperate character unknown to the defendant. But if these threats
421 were communicated, and of a deadly nature—remembering, in this connection, the proposition I have already given you, that you are to be satisfied that they have been established so you can depend upon them—or of this lawless and desperate character did exist, and one of these conditions, or both of them, was known to the defendant at the time of the killing of John Welch, and John Welch was making an overt demonstration of a character when coupled with the threats that might lead to the conclusion that he had a deadly purpose of a dangerous design upon

the person of the defendant, then they may be taken into account in that connection, and for that purpose. Now, let us see whether this is the law or not. In this same case which I have read from—the case of Wiggins v. The People of Utah—the doctrine of threats as bearing upon the question of previous threats was fully collated by Justice Clifford in his dissenting opinion, and stated in a better way than I can state it, and therefore I read them to you :

" Decided cases, too numerous for citation, are reported, in which it is held that evidence of the bad character of the deceased is not admissible in an indictment for felonious homicide, for the reason that it can not have any effect to excuse or *ap*lliate the offence."

This means bad character alone.

" Courts of justice everywhere agree that neither the bad character of the deceased nor any threats that he may have made forfeits his right to life, until, by some actual attempt to execute his threats, or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief on the part of
422 the slayer that it is necessary to deprive him of life in order to save his own or to prevent some felony upon his person."

Now, you see, John Welch must have been doing something that indicated a deadly purpose at the time, that indicated, when taken in connection with the threats and lawless and desperate character, a deadly purpose upon his part. Then the threats may be taken into account in the case.

"Jurists and text-writers appear to concur that antecedent threats alone, whether communicated or not, will not justify a subsequent deadly assault by the other party, unless the party who made the previous threats manifests, at the time of the act, a design to carry the threats into immediate effect."

"Actual danger of the kind, or a reasonable belief of such actual danger, must exist at the time, else the justification will fail. Repeated threats, even of a desperate and lawless man, will not and ought not to authorize the person threatened to take the life of the threatener, nor will any demonstration of hostility short of a manifest attempt to commit a felony justify a measure so extreme."

That is the law, and that is the law everywhere. That is the figure now that threats cut. If you find they were made, if you believe that this character exists, if you are satisfied on that proposition, before they can cut any figure in the case by way of justification there must be something being done by John Welch at the time of the killing that indicated that deadly purpose upon his part, or a purpose to do great violence when coupled with the threats. Now, that is sufficient upon that proposition.

I have given you, in connection with the case of John Welch, the
423 definition of the crime charged. I have given you the law of self-defense, and I have given you the figure that threats cut and the figure that a lawless and desperate character cuts in the case, and that embraces all the propositions, as I conceive, that are relevant to the issue involved in the case of John Welch.

We now come to the other case, which is the case for the killing of Robert Marshal. There are four counts in that indictment, but as the proof beyond any question shows that at the time of the killing Robert Marshal was what was known as an Indian policeman, as described in the

second count of the indictment, he was at the time aforesaid an Indian policeman appointed under the laws of the United States, what the court says will be confined to the second count of the indictment, and your finding may be based upon that count. Now, that give him certain rights as an officer. That imposed upon him certain duties. An Indian policeman is a person appointed to preserve the peace, and, in the language of the law, "to be employed to maintain order and prohibit traffic in liquor on the several Indian reservations." "To be employed to maintain order." You will bear in mind that you are, first, in this connection, to look at the killing of John Welch. If you find, under the law I have given you, that John Welch was doing nothing that gave the defendant a right, under the law, as I have declared it to you, to kill him, then the defendant in killing him would be in the wrong, and it was not only the right, but it was the duty of Robert Marshal when he saw that occurrence, when he saw that shooting, to seek to prevent it. Not only that, but as an officer, as an Indian policeman, as one engaged in the preservation of order, not only as an officer but as any citizen, it was his duty to arrest the defend-
424 ant, to seek to arrest him, to prevent a recurrence of a like transaction, and that he might be put under arrest for what he had done. That was his right. That was his duty. And from the time he entered upon that duty he had a right to stand upon the defensive, because an officer, while he is clothed with the authority as such and while he is properly seeking to execute that authority, is surrounded by the panoply of the law of self-defense, and has a right to stand upon it. He has a right to defend himself to the death as long as he is in the right; and not only that, but when an act which results in the death of another is being done, and the officer, in good faith—if it be true that John Welch was not doing that which give the defendant the right to kill him—and the officer in good faith was seeking to arrest him, and he could not do it except by the exercise of violent means, he had a right to use these violent means, because the law is that if you find, in this case, that by the killing of John Welch the defendant executed a high crime, Robert Marshal, in his effort to arrest the party who executed that crime, had a right to use violence that might be deadly in its character, if he could not bring him to in any other way. An officer in seeking to arrest for a felony, for a high crime, if he can not capture the man who he seeks to arrest, the law says he may take his life. That is why it is I give you so distinctly the case of John Welch first, that you might look at it to see whether or not a crime was committed by the defendant in killing Welch, because it goes largely to affect the status of the case growing out of the killing of Robert Marshal. If Robert Marshal was an officer—and the proof shows he was, beyond controversy; that he was an Indian policeman—he was there, and it was his duty
425 to suppress violence, to preserve order, to arrest the author of that violence, to arrest the one who may have precipitated that state of disorder, and if it be true, as I say, that the defendant had committed a crime by the killing of Welch, then in the effort upon the part of Marshal to arrest the defendant he had a right to use such violence as was necessary, first, to protect himself, and second, to secure that arrest, or to secure the person of the defendant. If he was in that attitude he was in the right, and it matters not though he may have fired first upon the defendant, if he saw danger there growing out of what he witnessed the

defendant as having done, or growing out of what the defendant was then doing, he was not a prudent officer, he was not a judicious officer, unless he saw at once the necessity of putting himself upon the defensive and executing such an act as was necessary to protect his own life while in the performance of a duty, and instead of being abused for it, if that was his attitude, he was to be commended for manfully facing deadly danger, seeking to execute his official duty in a way creditable to the Government whose officer he was, and in a way to protect the people who were there assembled. I say, if that was his attitude, if that was the attitude of this transaction as growing out of the killing first of Welch, then Marshal was in the right, and the killing of Marshal under such circumstances would be murder and nothing else. It would be the execution of a deadly purpose in such a way as to show that the defendant is guilty of the crime of murder, as I have defined it to you. It is charged in this indictment that Marshal was killed willfully, and killed with malice aforethought. I have already defined these expressions to you,
426 and it is unnecessary to define them further. You are to see, first, in this case, in this connection, if Marshal is dead; you are to see whether he died because he was shot with a pistol. You are to see again whether that pistol was in the hands of the defendant, or that he did the act of shooting; and again, whether or not, under the law, as I have defined it giving to you, the rights of Marshal, giving to you his duties, and looking at the status of the case growing 'ut of the killing of Welch, whether or not his killing was done willfully, and done with malice aforethought. If so, your duty is to find the defendant guilty of murder upon that charge, as set out in the second count of this indictment. Now, again, if Marshal had not been an officer, it is the duty of every citizen, if one man is committing a crime upon another, and especially a deadly crime, to seek to prevent that crime, and he has a right to use deadly violence to prevent it. My duty is to defend you, and you, and you, and you, and every other man while you are in the right. Of course, my right to defend depends upon the condition you are in. If you are in the wrong I would have no right to defend you, but I have if you are in the right. If John Welch was in the right when he was killed, under the law—that is to say, he was not doing anything that gave the defendant the right to invoke the law of self-defense, or the right to ask for a mitigation of the crime—then it was the duty of every citizen there to defend John Welch against the act of the defendant, and it was Robert Marshal's duty as a citizen to do that; and not only that, but it was Robert Marshal's duty as a citizen as well as the duty of every other citizen, to arrest a man who had committed a high crime, if it be true that
427 he had committed that crime. That, of course, is the cardinal proposition to be first determined. It is the duty of every citizen in this land, when ever a crime has been committed, to pursue the criminal and to seek to bring him to justice, and i' the execution of that design he is clothed precisely with the same power that the officer has looking towards the execution of the right of arrest. If it be true in this case that by the killing of John Welch the defendant committed a crime, then every citizen upon that ground had a right to pursue and arrest the defendant, and to use such violence as was necessary to secure his arrest, even to taking his life, and Robert Marshal upon that ground would be justified in doing what he did do if he fired the first shot.

Some propositions of law have been asked here by counsel for the defendant. Most of them have already been substantially declared to you, and I will give them to you as modified by the court, and those which are refused will not be read to you.

"First. Before you are authorized under the law to convict the defendant for the crime of murder, you must believe from the evidence that the alleged killing was done with malice aforethought, with premeditation and deliberation.

"Second. That before the jury are authorized to convict the defendant of murder they must believe from the evidence, beyond a reasonable doubt, that the defendant shot and killed the deceased with a sedate, deliberate mind and formed design, and that this element existed in defendant's mind before the killing occurred."

You have already had that proposition given to you as to how long it may exist in order to make out this requisite.

"Third. That malice in law as necessary to the crime of murder
428 is not confined to personal spite or ill will against individuals, but consists in a conscious violation of the law to the prejudice of another. That here is but one kind of malice, but only a distinction in the evidence by which it is established, and that the jury, in order to determine as to the existence of malice in the mind of the defendant before the killing, must take into consideration all the facts and circumstances growing out of the killing.

"Fourth." This instruction is given as modified. "That in determining as to the existence of malice in the defendant by which the killing may have occurred, the jury are instructed to carefully weigh and consider the conduct of the deceased at and immediately preceeding the killing, as well as the previous threats made against the life of the defendant, as well as the character of the deceased for being a desperate and dangerous man," provided, under the law I have given you, previous threats and a lawless and desperate and dangerous character of the deceased John Welch can be considered by you. "And that the jury must examine, with the aid of all the facts and circumstances in the case, as to the condition of the mind of the deceased in order to determine as to the danger, if any, which appeared to the defendant from the hand of deceased at the time of the killing."

"Seventh. That if the jury believe from the evidence that the deceased rushed towards the defendant in anger and in a menacing attitude as the defendant was fleeing to his own tent unarmed, and not knowing that he would see and procure a pistol from Scott Gentry, whom he unexpectedly found in his, defendant's, tent, and that the defendant in his
429 flight for safety accidentally saw and seized the pistol, and turned and fired the fatal shot as deceased was pursuing him and nearly in reach of him, and that the deceased was a man of superior strength to the defendant, then he could only be guilty of manslaughter."

Now, that implies in that connection that the deceased was doing something of a violent character; doing something that was an overt act in itself, and of that nature that would bring the mind of the defendant to a condition where it was in a state of frenzy.

"Eighth. That manslaughter consists in the killing of a human being where no malice exists in the mind of the slayer, although such killing may be willful and intentional; that malice and intent are both creations

of the human mind; both may exist at the same time, or the single intent to kill without the existence of malice may exist; that the intent to kill may be innocent or criminal according to the proofs in the case. The killing in self-defense is intentional, and not criminal.

"Ninth. That if the jury have a reasonable doubt as to whether malice existed or not in the mind of the defendant at the time of the killing, then they are not authorized to convict the defendant of the crime of murder."

"Twelfth. That if the jury believe from the evidence that at the time of the killing that the overt acts and conduct of the deceased were of such a character as to afford the defendant a reasonable cause to believe, situated as he was, that he was in danger of his life or of great bodily harm at the hands of the deceased, and that the defendant while acting under such reasonable belief shot and killed deceased, the jury should acquit."

430 Now, gentlemen, there are a few other propositions which are necessary to be given to you. Some lengthy discussion has been had on both sides as to what is meant by reasonable doubt; by proof beyond a reasonable doubt. The law says that in order to convict of these crimes, or either one of them, you must be satisfied to a degree of certainty defined by the law, which the law undertakes to define. That is a proposition that is rather difficult to understand when abstractly stated. It best can be understood by illustration. It may be led off on metaphysical lines and carried to such an extent as that we lose ourselves in the contemplation of it; but when we bring it down to its practical application, and as we use it every day as our duty calls upon us to use it, it is not difficult to understand. It is a practical proposition. If we look at it merely as a theory and run off on that line, we are liable to be led astray by it, but if we consider it as men who are reasonable do, and as men use it when they are contemplating propositions upon which they are acting, it is one easy to understand. Now, that, too, has been defined by the Supreme Court of the United States; rather, it has been quoted approvingly by that court as defined by other tribunals. In the case of Houpt v. Utah the court below charged the jury on this proposition, and the charge was approved by the Supreme Court:

"The court charges you that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt; that if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find him not guilty. You are further instructed that you can not find the

431 defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt.

"The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt."

Now, that brings it down to the practical application of it in the every-day affairs of life. Let us see what is meant by it. The law in view-

ing the conduct of men takes a standard. A man charges another before you in a way that it becomes your duty to investigate that charge. In justice to the man charged, in justice to the community, if it is a crime, especially if it is the crime charged here, instantly your rights, your duties spring into existence, and the rights of all the people call upon you to exercise these duties, first to investigate that charge; if you investigate it so far as to satisfy you that you have an abiding faith in the truth of the charge, and you believe it with such certainty that you act upon that belief, and take whatever action duty calls upon you to take, you would believe it in the execution of the everyday duties outside of the jury box, you would believe a charge when proven to that extent, and that is what is meant by proving it beyond a reasonable doubt, because the
432 law contemplates that a man by the law of morals, by the law of duty, does not believe a charge of a serious character affecting another until he does investigate, and until he does pursue that investigation so that he is so confident of the truth of it that he acts upon it.

Now, again, upon this proposition, in the case of the Commonwealth v. Webster, 5 Cush. (Mass.), 295, 320 (S. C., 52 Am. Dec., 711), the supreme judicial court of Massachusetts stated in its charge that it was not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged against the prisoner was more likely to be true than the contrary, and said: "The evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt."

"The difficulty with this instruction is that the words 'to a reasonable and moral certainty' add nothing to the words 'beyond a reasonable doubt;' one may require explanation as well as the other. In Commonwealth v. Costley, 118 Mass., 1, the same court held that, as applied to a judicial trial for crime, the two phrases were synonymous and equivalent, and that each signified such proof as would satisfy the judgment and consciences of the jury that the crime charged had been committed by the defendant, and so satisfy them as to leave no other reasonable conclusion possible. It was there also said that an instruction to the jury that they should be satisfied of the defendant's guilt beyond a reasonable doubt had
433 often been held sufficient, without further explanation. In many cases it may undoubtedly be sufficient. It is simple, and as a rule to guide the jury is as intelligible to them generally as any which could be stated with respect to the conviction they should have of the defendant's guilt to justify a verdict against him. But in many instances, especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just comprehension. As a matter of fact, it has been the general practice in this country of courts holding criminal trials to give such explanation or illustration. The rule may be, and often is, rendered obscure by attempts at definition which serve to create doubts instead of removing them.

"The instruction is not materially different from that given by Lord Tenterden, as repeated and adopted by Chief Baron Pollock in Rev. Muller. 'I have heard,' said the chief baron, addressing the jury, 'the late Lord Tenterden frequently lay down a rule which I will pronounce to

you in his own language' 'It is not necessary that you should have a certainty, which does not belong to any human transaction whatever. It is only necessary that you should have that certainty with which you should transact your own most important concerns in life.' No doubt the question before you to-day, involving at it does the life of the prisoner at the bar, must be deemed to be of the highest importance; but you are only required to have that degree of certainty with which you decide upon and conclude your own most important transactions in life. To require more would be really to prevent the repression of crime, which it is the object of criminal courts to effect."

Gentlemen, that is as good a definition of what is meant by reasonable doubt as can be given you.

434 There remains but one other proposition, and that is the one in which there is involved the declaratory principles of the law which are to be given you to direct you as to the method you are to adopt in weighing the evidence in the case. As you know, there are but two kinds of evidence that can be invoked in any case. If a man sees a transaction, as in this case one of the material facts is the shooting by the defendant of Robert Marshal and of John Welch, you take the material fact; is there any evidence here by persons who saw that shooting? If there is, that is positive testimony; that is positive evidence of it; that is the evidence of eyewitnesses; that is evidence of those who uses one of their senses to observe the facts that they give you. You see what the strength of that evidence is; you see what the opportunity of the witness was, see what the character of the observation was that they made as to that transaction; see how many of them corroborate each other; see what their apparent character is as derived from their past lives, or from their appearance before you, from their manner of testifying. You are to pass upon the evidence as to its consistency, reasonableness and probability in its own light, and in the light of the other evidence you may find to be true in the case. Now, it is a good rule in these cases to gather up all the facts, first, that you find to be true. That is the first duty that devolves upon you when you go to the jury room—to see what is the truth in the case, and what facts are false. If you find some evidence that is true, set that aside as evidence that you can depend upon. If you find other evidence which is false, eliminate it from the case, because you are not permitted to pass upon the case and determine its merits by the light of falsehood, or by that which may be supported by perjury or fraud.

435 When you find the truth in the case, gather up all that truth, see what it establishes, see what propositions it makes out, see what is proven by it. In passing upon the weight of the evidence you are to consider these things I have named, and you are to consider the past lives, and the past conduct, and the past history of the men who come before you as witnesses, as I have already reminded you. That is why these questions are permitted to be asked. The witness goes on the stand, and his past life can be probed so you can look into that life and see whether it is one possessed by a person who would likely be truthful. That is one method of getting at the truth or falsity of a statement. Then you consider the interest that a witness may have in the case, how he or they are to be affected by the result of it. That witness may occupy such a relation to the case as to be affected directly by the result of it. Then you

pass upon the testimony in the light of its reasonableness, the reasonableness of the statements of the witnesses, and the probability of these statements.

I say to you in conclusion, gentlemen, if you find this case, or these cases—because there are two of them, and you are required to pass upon both of them, find verdicts in each case—proven to the extent that I have told you by reading from these authorities that it is necessary to be proven, beyond a reasonable doubt, and that state of case makes a case of murder, your duty is to say so. If it does not, but makes another crime, your duty is to say so. If it is not proven to that extent, your duty is to acquit.

I put the case in your hands, and ask you, if in your judgment,
436 and by the light of this evidence that you may find to be true by the application of the law to that testimony, you are satisfied that the law has been violated, to vindicate it in the only way it can be vindicated, by upholding its sanctity and power for the protection of human life. You will find forms of verdicts upon the back of each of these indictments.

You will retire, gentlemen, to make up your verdicts.

Mr. THOMAS MARCUM (of counsel for defendant.) If your honor please, I would like to ask leave to file exceptions to the charge?

The COURT. Yes, sir.

437 The court, among other things, charged the jury as follows:

"This charge for the killing of John Welch is one of murder, for the indictment alleges that the defendant, Charles Smith, by shooting him with a pistol wilfully and with malice aforethought took the life of John Welch, alleged in the indictment to be a negro and not an Indian. This is a fact necessary to give the court jurisdiction. If the proof shows that he was a negro, a colored man belonging to that race, notwithstanding it may show that he married a Creek Indian woman, the court tells you that it has jurisdiction to try this case. You, in connection with the court, have a right, under the law, to hear and determine the case upon its merits, because a marriage to a Creek Indian woman by a colored man does not, under the law, denationalize that man. He is a jurisdictional citizen, and he does not become a citizen of the Creek country by virtue of such a marriage, as is the case with some of the other nations. Therefore, that is an unimportant fact whether he was married or not. If the proof shows, according to the allegation in the indictment, that he was a negro, then you may pass upon the question of jurisdiction in favor of this court having jurisdiction, and put it aside as one that is established beyond a reasonable doubt."

To the giving of which charge the defendant at the time excepted.

"Now, above all, in this case it is important to look at the character of the shooting; to look at the manner of it, because there are characteristics attending the doing of an act done in self-defense entirely different,
438 as a rule, from those done wantonally and wickedly and recklessly in such a way as to show a wanton and reckless and wicked spirit. If a man is acting in self-defense, for example, when he has accomplished that defensive purpose he stops. He is conscious of it. The motive that prompts him to attack then is one of safety to himself. The one that prompts him to act where he kills wickedly and recklessly is called a wicked motive which drives him on to destroy, wantonally and wickedly, human life. Therefore, I say, it is highly important that the

character of the act of the man should be seen as it exists, the very nature of the shooting; the very fact that it is repeated and repeated. When that transpires it is to be taken into account to show the frame of the mind of the party who did the act as done."

To the giving of which charge to the jury the defendant at the time excepted.

"Can you kill another because of words used by him, and says that that is manslaughter? Not at all. The grade of crime is reduced, because he who is killed at the time of the killing is doing some provocative act, some act that puts the mind of the party in such a condition that he is incapable of deliberation. That does not mean if he works himself into a state of deadly frenzy, works himself into a condition where he becomes reckless to human life, that he has a right to execute a wanton purpose, but it means that because of some act done by the party who is killed at the time of the killing, other than words used by him, that his mind is brought to a condition where he is not responsible for the act to the extent that it can be considered as a deliberate act, as one that is formed from a premeditated purpose, as that it grows out of a state of wantonness or wickedness upon his part. Now the case where that usually arises is where it grows out of a conflict or where it grows out of a case of the use of some great
439 indignity, such as is sometimes taken into consideration by the law as a mitigating fact or where it grows out of a conflict between the parties. The fact that one man may use words to another, opprobrious epithes*t*, no matter how severe they may be, these are not mitigating facts, and they cannot be taken into account to reduce the grade of the crime, these things alone, but it is something that must be higher than that, something that must be more effective than that, to put the mind of the party in a condition where it is incapacitated from deliberation or premeditation. Now the law says, in defining it, referring to the classes of cases where there is a conflict out of which this condition may arise, that voluntary manslaughter is the unlawful killing of another without malice on sudden quarrel, or in heat of passion. Where, upon sudden quarrel, two persons fight and one of them kills the other, this is voluntary manslaughter. And so if they upon such occasion go out and fight in a field, for this is one continued act of passion. In this and such like cases the law, kindly appreciating the infirmities of human nature, takes into account the provocative facts that exerted an influence because of the conduct of the party killed—a state of case, for example, where one man has cut the reins of another, and a third protests against it, and words follow between them, and because of these words one seizes a deadly weapon and fires and fires and fires it again, upon the person who thus protests, or who may have used words against him—that is not a state of case that is mitigated, that is reduced in grade, because of the conduct of the party, for the conduct of the party who is killed would not be of that provocative character that the law contemplates as sufficient to put his mind in that inflamed condition where his act occupoes a midway position between a case that
440 can be characterized by the law of self-defense as one that is excusable, and a case of murder. Now, that is what is meant by manslaughter. That is how the law defines it. It is for you to say what it is that exists in this case."

To the giving of which charge to the jury the defendant at the time excepted.

"Now, let us read what the law defining the right is in the hands of the citizen to take life. First, 'A man who is in the lawful pursuit of his business'—that is, he is doing what he had a right to do under the law at the time. That is the first thing that must exist. 'A man who*m* is in the lawful pursuit of his business is attacked by another under circumstances which denote an intention to take away his life.' The attack must be of a certain character; it must have been the kind to indicate a purpose upon the part of Welch to take away the life of the defendant, or to do him great violence, to do him some enormous bodily harm. Now, if that state of case exist, the law says he may have lawfully killed John Welch, provided he used all the means in his power otherwise to save his own life, such as retreating as far as he could or disabling his adversary without killing him if it be in his power. The proposition is very simple, and very easily understood. It is very brief. The cardinal principle underlying it is that he must have been in the right himself; he must have been doing what he had a right to do. If he was doing that which contributed to produce an act of violence between himself and Welch or between himself and anybody else at the time, which might lead to a deadly result, that might bring about a deadly affray, he was in the wrong; he was not in the right. If that state of case exists, then he was in the right, doing what he had a right to do, and was attacked
441 by Welch in such a way as to indicate from the character of the attack a purpose upon the part of Welch to take his life or to do him great violence, he could kill Welch provided he could not by the exercise of any other reasonable means save his life. That is the statement of the proposition of what is called real danger, in short form. It means that the danger was danger to life or of great violence to his person; that it then and there confronting him, and that he could not escape from it; danger that was then and there impending over him, and that he could only turn aside by striking, and striking to the death, the man from whom that danger came. If there was not any danger coming from Welch of that character, then this proposition passes out of the case."

To the giving of which charge to the jury the defendant at the time excepted.

"In this case it is claimed, and the evidence has been offered to show, that the deceased, John Welch, made threats against the life of the defendant. Not only that, but it is accompanied by the proposition that he was a man of lawless and reckless and dangerous character. It becomes necessary, therefore, that the court should take up sufficient of your time to tell you what figure these propositions cut in the case, provided you believe they are established. But that is the first thing you are to pass upon. And in seeing whether they are established or not you are to consider the source from which the evidence comes; the very character of the witnesses as disclosed by themselves. If thes' allegations of threats made against the defendant come from men who are entitled to credit, you are to believe them and apply them, provided there is a state of case where you can apply them. But if they come from men who appear before you as confessed criminals, as men who are confessed fakirs, gamblers, and introducers of

whiskey into that country, and guilty of crimes, you have a right
442 to take all these things into account in passing upon the credibility of the evidence, because evidence to be believed must come from a pure source. If a man says he has been scared by confessed crimes, if he has been a violator of the law, you are to take that fact into consideration in passing upon his evidence, because you are entitled to his past life, to know his past life, to enable you to see whether he is making a true statement or not. You are to take into consideration the further facts that it becomes easy to assert a threat that can not be contradicted. A man swears to you that A made threats against B, when nobody was present; A is in his grave, dead, and cannot deny them; and it becomes an easy method of defense often resorted to in this tribunal, often applied, and you are with care, with scrutiny, and diligence, to look at the character of the man from whom such declarations come, to see whether they are of the character that in your judgment as fair-minded men, as men of uprightness and having consciences, of pure heart, can rely upon these statements. If you can not, cast them aside as so much stuff invoked for a purpose in the case. And the same with reference to character of deceased. It becomes easy to assert that a man is a man of lawless and desperate character when he is in his grave and cannot refute that imputation; he cannot resent it; he is gone; nobody to speak for him. And upon that proposition as in the other, you are to see that the source from which these declarations come is a source of such purity that you can depend upon it as being true."

To the giving of which charge to the jury the defendant at the time excepted.

"Now, what is reputation? It is the reflection of character. Character is the thing itself. It is that which a man makes day after day, and hour after hour, and year after year, by his bearing and conduct in the community where he lives. If that thing is reflected by the words spoken by men of credit, by men of standing, by men of pure character standing before you, that such reputation is so reflected as that
443 you can believe it, of course it is entitled to consideration and to be taken in the case if it is applicable. But it is to come from men who are morally and mentally competent to know what it means. If a man is without character himself, if his action has been characterized by crime, if his conscience has been seared by criminal conduct, he is thus rendered incompetent to know what character is. He has none himself, and he is incompetent to determine when other men have one. And above all is it necessary, important, and essential to the interests of public justice that that justice should not be defeated by men of that character scraped from the four corners of the earth. You are to see to it that it comes from a pure source; and then, again, you are to see to it that it is the reflection not by keepers of dives and gambling hells, and violators of law, and prison convicts, but it is the reflection of honest and conscientious men, of men who possess character themselves; men of integrity; men whose judgments make up in your community your character that you prize so highly, because it is the opinion of honest, intelligent, judicious, and just men and women in your community. That is the source that character is to come from, and the only source from which you can derive it in a reliable way. If it does not come from that source, but comes from the source I have designated, cast it aside as so much worthless matter invoked wrongfully in cases of this character."

To the giving of which charge to the jury the defendant at the time excepted.

"Now, provided you believe that these two characteristics known as lawless and desperate characters, and deadly and violent threats against the defendant, are established because they come from the source I have
444 named, then you are to see what application is to be made of these conditions. You naturally inquire in this connection if a man can be killed because he is a man of bad character. Not at all. It would never do to leave that to the judgment of the defendant, or anybody else, because they would be mistaken about it; they would come to a wrong conclusion. There would be too many men killed upon that ground. What is the rule? When can a character cut a figure in a case? I might ask in this connection, as you would naturally ask, whether a man can be killed because of threats made against another? Not at all. If so, the law of assassination is an easy one of application. A wants B killed, and he goes and tells C that B has made violent threats against him, and C kills B, and then comes into court and asks to be excused for it, and if that was the law he could be excused, yet it might turn out afterwards that B never made any threats at all, and A being an assassin at heart and a coward besides, being anxious to have B killed, he gets an innocent man to do it by telling him a falsehood. The law does not deal in any such trickery as that. The law does not lay down any such proposition as that. The law is just in all its provisions. I now will give to you what state of case must exist where previous character of the kind I have named, or threats of a deadly nature, or of great violence to the defendant in this case, can be considered by you. But if there is a question upon that point you may consider them as illustrating the occurrence at the time. Now that is the figure that threats uncommunicated cut, or unless and desperate character unknown to the defendant. But if these threats were communicated, and of a deadly nature, remembering, in this connection, the proposition I have already given you, that you are to be satisfied that they have been established so you can depend upon them, or if this lawless and desperate character did exist, and one of these conditions, or both of them, was known to the defendant at the time of the killing of
445 John Welch, and John Welch was making an overt demonstration of a character when coupled with the threats that might lead to the conclusion that he had a deadly purpose or a dangerous design upon the person of the defendant, then they may be taken into account in that connection, and for that purpose. Now, let us see whether this is the law or not. In this same case which I have read from—the case of Wiggins v. The People of Utah—the doctrine of threats as bearing upon the question of previous threats was fully collated by Justice Clifford in his dissenting opinion, and stated in a better way than I can state it, and therefore I read them to you." "Decided cases, too numerous for citation, are reported, in which it is held that evidence of the bad character of the deceased is not admissable in an indictment for felonious homicide, for the reason that it can not have any effect to excuse or palliate the offence." This means bad character alone.

"Courts of justice everywhere agree that neither the bad character of the deceased nor any threats that he may have made forfeits his right to life, until by some actual attempt to execute his threats, or by some act or

demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief on the part of the slayer that it is necessary to deprive him of life in order to save his own or to prevent some felony upon his person." Now, you see, John Welch must have been doing something that indicated a deadly purpose at the time, that indicated, when taken into connection with the threats and lawless and desperate character, a deadly purpose upon his part, then the threats and the lawless and desperate character may be taken into account in the case.

"Jurists and text writers appear to concur that antecedent threats *alone*, whether communicated or not, will not justify a subsequent deadly
446 assault by the other party, unless the party who made the previous threats manifests at the time of the act a design to carry the threat into immediate effect."

"Actual danger of the kind, or a reasonable belief of such actual danger, must exist at the time, else the justification will fail. Repeated threats, even of a desperate and lawless man, will not and ought not to authorize the person threatened to take the life of the threatener, nor will any demonstration of hostility, short of a manifest attempt to commit felony, justify a measure so extreme."

To the giving of which charge to the jury the defendant at the time excepted. The court, among other things, charged the jury as follows: "Fourth." This instruction is given as modified. "That in determining as to the existence of malice in the defendant by which the killing may have occurred the jury are instructed to carefully weigh and consider the conduct of the deceased at and immediately preceding the killing, as well as the previous threats made against the life of the defendant, as well as the character of the deceased for being a desperate and dangerous man, provided, under the law I have given you, previous threats and a lawless and desperate and dangerous character of the deceased, John Welch, can be considered by you. "And that the jury must examine, with the aid of all the facts and circumstances in the case, as to the condition of the mind of the deceased in order to determine as to the danger, if any, which appeared to the defendant from the hand of the deceased at the time of the killing." This was the fourth instruction asked by the defendant and given by the court with the words, "provided, under the law I have given you, previous threats and lawless and desperate and dangerous character of the deceased, John Welch, can be considered by you."

To which modification the defendant at the time excepted. The defendant asked the court to instruct the jury as follows:

447 "Fifth. That if the jury believed from the evidence that the defendant at the time of the killing honestly believed from the conduct of the deceased that he was in imminent danger of his life, or great bodily harm at the hand of the deceased, they should acquit."

Also the following:

"Sixth. That if the jury believed from the evidence that the defendant, as a reasonable man and situated as he was at the time of the killing, believed that he was in danger of his life or great bodily harm at the hands of the deceased from all he saw and knew of the conduct and purpose of the deceased at the time he shot and killed the deceased, the jury should acquit, although there may have been no actual danger to the defendant."

Also the following:

"Eleventh. That if the jury believed from the evidence that the deceased John Welch was a member of the Creek tribe of Indians—that is, if he was married to a citizen of the Creek Nation and resided in that nation, and the killing occurred in the Creek Nation, then this court is without jurisdiction, and the jury should acquit."

Which proposition of law as asked by the defendant the court refused to give. To which refusal the defendant at the time excepted. The jury found the defendant guilty of murder for the killing of John Welch and manslaughter for the killing of Robert Marshal.

To all of which rulings of the court and instructions to the jury to give instructions as asked by the defendant and to modifying instructions as asked by the defendant, the defendant at the time of such rulings excepted. Whereupon defendant filed a motion for a new trial, which motion was by the court overruled, and in overruling made the following remarks:

448 In the circuit court of the United States, within and for the western district of Arkansas, February term, A. D. 1895.

UNITED STATES
vs.
CHARLES SMITH. } Murder.

Ruling of the court on motion for a new trial.

MONDAY MORNING, *April 15th*, 1895.

PARKER, J.:

In this case there is a motion for a new trial which contains several causes why a new trial should be granted, and it is necessary that they should be passed upon by the court. The first cause set up is, "Because the verdict is contrary to law, and is not sustained by sufficient evidence." I do not think the verdict is contrary to the law, and that it is not sustained by the testimony. I think the evidence is abundant to sustain it. The second cause set up is, "Because the court erred in *o*ferruling the demurrer filed by the defendant to the indictment No. 100." The ground for that demurrer was that there was not sufficient description of the citizenship of the parties. I believe the allegation was that the party was a negro, and not an Indian. That doctrine has recently been before the Supreme Court of the United States in the case of Westmoreland v. U. S., 155 U. S., 545, in which it held that an averment in an indictment for murder that the defendant is a white person and not an Indian is
449 sufficient to show that he is outside of the first clause of the Revised Statutes, section 2146—that is, that he was an Indian. It seems to me that is conclusive upon this proposition, because it is just the same in effect to allege a man is a negro and not an Indian as it is to allege he is a white man and not an Indian. It is the allegation of a jurisdictional fact. Either allegations means that he is a citizen of the United States. All persons are jurisdictional citizens of the United States except Indians who are charged with crime against other Indians. According to the dec'sion of the Supreme Court this is sufficient to give this court jurisdiction, and there is nothing, therefore, in that cause.

The third cause is as to the right to ask a witness if he has not been convicted of crime. That, as best as I can understand what is meant, has reference to the question asked of the witness Gentry. It seems to me that this question also is thoroughly settled by the law. It is asked of the witness to affect his credibility. Sec. 474 of Wharton's Criminal Evidence states:

"In a leading case, Lord Ellenborough, C. J., compelled a witness to answer whether he had not been confined for theft in jail; and, on the witness's appealing to the court, said, 'If you do not answer I will send you there.' In this country there has been some hesitation in permitting a question the answer to which not merely imputes disgrace, but touches on matters of record; but the tendency now is, if the question be given for the purpose of honestly discrediting a witness, to require an answer."

"Sir James Stephen, in his Digest of the Law of Evidence, expounds the law as follows: 'When a witness is cross-examined he may be
450 asked any questions which tend (1) to test his accuracy, veracity, or credibility, or (2) to shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except in the case provided for in article 120, namely, when the answer might expose him to a criminal charge or penalty."

There can be no doubt that so far as the law now is that that question can be put. It is put in this court on both sides of cases every day in trials, because there is scarcely a case tried where some witness or witnesses are not in that condition. I suppose there was never a court where the same array of witnesses on each side of cases presents so many instances of their having been convicted of some crime. Of course it is not right to ask a witness if he is charged by the community or by his neighbors of a crime. That would not be proper. But where he is charged in a court, in a proper way, with a crime, it is proper to ask that question.

The fourth cause set up in the motion for a new trial relates to the subject of the marriage of John Welch to a Creek citizen. There is no law that could make him a citizen of the Creek Nation by virtue of that marriage, because the Creek Nation has no method of adoption of that kind, and therefore the question was immaterial whether he was married to a Creek citizen or not.

The fifth cause as set up in the motion is:

"Because the court erred in allowing the prosecution to consolidate the two cases for which the defendant was tried for two distinct homi-
451 cides on indictments numbered 99 and 100, charging the defendant with two distinct murders, over the objection of the defendant."

That question is settled, as I think, by sec. 1024 of the Revised Statutes of the United States, and settled clearly by the case of Pointer v. U. S., a case going up from this court, and reported in 15 U. S. Supreme Court Reports, 396; and settled also in the recent case of Ingraham v. U. S., 155 U. S. 434, a case going up from the eastern district of Texas. It is not necessary to assert anything further upon that, because the question has twice been before the Supreme Court in cases where there was a consolidation of offenses. In the Pointer Case there were two murders charged. Under sec. 1024 it was held it was proper to consolidate them

for trial. They may be consolidated, under the language of that section, when they are of a similar nature, even; not only cases that are connected, but cases that may be entirely disconnected, if they are of the same character of crimes, having following them the same character of punishment.

There seems to be an objection, judging from the sixth cause set up for a new trial, because the court erred in charging the jury upon the subject of manslaughter. If it had been the province of the court to pass upon the credibility of the evidence, it would have been clearly er'or, in my judgment, and I am not sure it was not entirely erroneous upon the part of the court to charge the jury upon the subject of manslaughter anyhow, because the evidence that could be relied upon as credible entirely drove out of the case anything like manslaughter. It was nothing but a cold-blooded, deliberate murder. But if the court did err in that
452 direction, it is an error upon which the defendant has not the right to ask for a new trial, because it was an error in his favor in giving the charge upon the subject at all, and he would not have a right to insist upon the verdict being disturbed upon that ground.

The seventh cause has reference, as I conceive, to a criticism by the court of the testimony of the witnesses. It may be taken in connection with the tenth cause, and they may both be considered together.

The seventh cause as set up is:

"Because the court erred in charging the jury that in determining upon the question of the credibility of witnesses for the defendant, who proved the threats of deceased, Welch, against defendant's life, and also the character of said Welch for being a desperate, dangerous man, the said witnesses not having been contradicted in the testimony upon those subjects, and not having been impeached by general bad character."

The tenth cause as set up is:

"Because the court erred in criticising the defendant's witnesses, and in using harsh and denunciatory language regarding them, and in giving undue prominence to the fact that some of them at times in their lives had gambled, and in using language indicating to the jury an opinion adverse to the veracity of defendant's witnesses."

That makes it necessary to look at what the court said on that subject, as found on pp. 32, 33, 34, 39, and also on p. 50, where there is a slight allusion to the same subject. Commencing so it will make the part of the charge referred to intelligent, the charge reads:

453 "It becomes necessary, therefore, that the court should take up sufficient of your time to tell you what figure these propositions cut in the case, provided you believe they are established."

That has reference to the threats and lawless character of Welch.

"But that is the first thing you are to pass upon. And in seeing whether they are established or not you are to consider the cource from which the evidence comes; the very character of the witnesses as disclosed by themselves. If these allegations of threats made against the defendant come from men who are entitled to credit, you are to believe them and apply them, provided there is a state of case where you can apply them. But if they come from men who appear before you as confessed criminals, as men who are confessed fakirs, gamblers, introducers of whiskey into that country, and guilty of crimes, you have a right to take all these things

into account in passing upon the credibility of the evidence, because evidence to be believed must come through a pure source. If a man says he has been seared by confessed crime, if he has been a violator of the law, you are to take that fact into consideration in passing upon his evidence, because you are entitled to his past life, to know his past life, to enable you to see whether he is making a true statement or not. You are to take into consideration the further fact that it becomes easy to assert a threat that can not be contradicted. A man swears to you that A made threats against B when nobody was present; A is in his grave, dead, and can not deny them; and it becomes an easy method of defense, often resorted to in this tribunal, often applied, and you are with care, with scrutiny, and
454 diligence to look at the character of the men from whom such declarations come, to see whether they are of the character that in your judgment as fair-minded men, as men of uprightness, and having consciences and pure hearts, can rely upon these statements. If you can not, cast them aside as so much stuff invoked for a purpose in the case. And the same with reference to character. It becomes easy to assert that a man is a man of a lawless and desperate character when he is in his grave and can not refute that imputation; he can not resent it; he is gone; nobody to speak for him. And upon that proposition, as in the other, you are to see that the source through which these declarations comes is a source of such purity that you can depend upon it as being true."

That, in substance, is what was said on that subject. It may be well in this connection to bear in mind the principle that courts of the United States have a right to give their opinion to the jury in detail, upon every specific fact in the case, as to what that fact is worth, how much it proves, what it tends to prove. That has been so often decided that it is not necessary to refer to decision, provided they leave to the jury the ultimate right to pass upon the question. Now, if that principle is correct, the court in this case did not go as far as it had a right to, because it did not comment on these facts, did not tell the jury what they proved, but simply told them what they had a right to take into consideration in passing upon the statements of this remarkable crowd of witnessess who were marched in for the defense in this case. I assert it as a fact, and it is a very broad assertion, because if there ever was a place where perjury has been piled mountain high, it is here; but I assert that there never was a case
455 tried in this court where there was the same array of villians, fakirs, gamblers, and criminals invoked as there was in this case. Let us see who they are by their own confession, by their own admission. Here is C. C. Ransom: Arrested once at Muskogee for murder, brought to Ft. Smith, and acquitted; served two or three times in Muskogee jail for gambling; twice in Ft. Smith jail for fighting and being drunk. Fred Virgil: Arrested for larceny at Parsons, Kansas; convicted, and served three months in the county jail. John Vann: Arrested upon a whiskey charge and served 90 days at this place; arrested for horse stealing, and discharged before the commissioner; arrested for arson; arrested for disturbing the peace, and acquitted. Charles Shepard: Arrested for whiskey twice, plead guilty, 35 days in jail the first time and 50 days the second time, both in this court; arrested on application for peace warrant; was running a gambling game at the fair when the shooting occurred; was at

three of the payments last summer with a gambling device. Roswell Mackey: Arrested twice for whiskey, served jail sentence each time in this court. John Smith: Arrested for murder, acquitted in this court; arrested for gambling and acquitted; once and a while, a gambler. A. B. Brown: Arrested at Muskogee on whiskey charge, case pending; formerly run gambling house in Muskogee. Charles Smith, the defendant: Arrested for murder, convicted of manslaughter, sentenced to ten years; arrested on whiskey charge twice, plead guilty in this court; arrested for gambling twice, at Muskogee. Alfred Shoat: Arrested for fighting and gambling; sometimes a gambler. Dave Roberts: Arrested for whiskey, ignored by the grand jury. That is the array of testimony, with the exception of one witness, and that one seems to have escaped arrest.

456 Whether he was engaged in the various violations of the law with these other witnesses I know not. But that is the array of witnesses upon which the comments of the court—so-called severe comments—harsh comments in the language of the motion, put there evidently with the expectation that the Supreme Court might lay hold of something of that kind and reverse the case on that ground, looking at the assertion in the motion rather than to what the court in its charge said as to the array of witness' and their testimony, such as were offered in this case, and who the jury was seriously asked to believe. There is not a man in private life that under any circumstances would believe a word they would say if they had a single grain of interest that would prompt them to tell a lie. They were manifestly liars from their method of testifying on the stand. Their character was so blackened and seared with crime that it was impossible for them to tell the truth, and the court might have given that as its opinion to the jury, but it did not see proper to do so. Of course it can not affect the verdict of the jury now, by the court truthfully expressing its opinion as to what was the status of this crowd of men who were introduced here for the purpose of securing a false verdict.

The eighth cause as set up in the motion is:

"Because the court erred in refusing to give to the jury instructions asked for by the defendant, and in modifying, and the modifications of instructions asked for by the defendant."

The instructions asked for by the defendant were given very liberally by the court; more given than ought to have been given by the law, and the modifications were such as did not substantially affect the mean-

457 ing of the instructions as they were asked by the defendant. And I think, taking all these causes together, and considering them, there is no ground for interfering with this verdict, and the motion for a new trial will be overruled.

458 And now comes defendant and presents this his bill of exceptions, and prays that the same signed and made a part of the record in this case, which is accordingly done.

I. C. PARKER,
U. S. Dist. Judge, holding Circuit Court.

(Endorsed on back:) Filed April 29, 1895. S. Wheeler, clerk. By I. M. Dodge, D. C.

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That, in substance, is what was said on that subject. It may be well in this connection to bear in mind the principle that courts of the United States have a right to give their opinion to the jury in detail, upon every specific fact in the case, as to what that fact is worth, how much it proves, what it tends to prove. That has been so often decided that it is not necessary to refer to decision, provided they leave to the jury the ultimate right to pass upon the question. Now, if that principle is correct, the court in this case did not go as far as it had a right to, because it did not comment on these facts, did not tell the jury what they proved, but simply told them what they had a right to take into consideration in passing upon the statements of this remarkable crowd of witnessess who were marched in for the defense in this case. I assert it as a fact, and it is a very broad assertion, because if there ever was a place where perjury has been piled mountain high, it is here; but I assert that there never was a case
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457 ing of the instructions as they were asked by the defendant. And I think, taking all these causes together, and considering them, there is no ground for interfering with this verdict, and the motion for a new trial will be overruled.

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I. C. PARKER,
U. S. Dist. Judge, holding Circuit Court.

(Endorsed on back:) Filed April 29, 1895. S. Wheeler, clerk. By I. M. Dodge, D. C.

459 *Assignment of errors.*

In the circuit court of the United States for the western district of Arkansas, February term, 1895.

UNITED STATES }
vs. } Murder.
CHARLES SMITH. }

The defendant, Charles Smith, files this his assignment of errors committed on trial of said cause:

1st. It was error of the court to overrule the demurrer filed by the defendant to the indictment, No. 100, charging him with the murder of John Welch.

2nd. It was error of the court to consolidate the two cases and to try the defendant upon the two separate indictments at the same time.

3rd. It was error for the court to refuse to allow the witness, William Gentry, to answer the following question:

"Do you know his (John Welch's) character, there in that community, for being overbearing, and also as to the strength of John Welch and the relative strength of Welch and the defendant."

4th. It was error of the court to permit the district attorney to ask the witness, William Gentry, if he had ever been arrested on any charge; if he had been arrested for perjury, and if the case was not now pending against him at Muskogee."

5th. It was error for the court to refuse to allow the witness, James Smith, to answer the question, "whether or not he knew what Welch's habit was with reference to carrying a pistol."

6th. In was error of the court to refuse to allow the witness, James Smith, to answer the question, "whether or not the deceased (Welch) carried a pistol, or how long he had had a pistol."

460 7th. It was error of the court to refuse to allow the defendant to show that the deceased, John Welch, was in the habit of carrying a pistol.

8th. It was error for the court to refuse to allow the defendant to ask the witness, Roswell Mackey, the following question:

"Did you know his (John Welch's) general character in the community where he lived for being quarrelsome and overbearing man?"

9th. It was error for the court to permit the district attorney to ask the witness, Jim Smith, on cross-examination the following question:

"Murder and gambling are the only things, I believe, against you?"

10th. It was error for the court to permit the district attorney to introduce and examine Frank Parke as a witness against the defendant, because the defendant had never been served with any notice that he would be used as a witness against him.

11th. It was error for the court to charge the jury as follows:

461 "This charge for the killing of John Welch is one of murder, for the indictment alleges that the defendant, Charles Smith, by shooting him with a pistol, wilfully and with malice aforethought took the life of John Welch, alleged in the indictment to be a negro and not an Indian. This is a fact necessary to give the court jurisdiction. If the

proof shows that he was a negro—a colored man, belonging to that race, notwithstanding it may show that he married a Creek Indian woman—the court tells you that it has jurisdiction to try this case. You, in connection with the court, have a right, under the law, to hear and determine the case upon its merits, because a marriage to a Creek Indian woman by a colored man does not, under the law, denationalize that man. He is a jurisdictional citizen, and he does not become a citizen of the Creek country by virtue of such a marriage, as is the case with some of the other nations. Therefore that is an unimportant fact whether he was married or not. If the proof shows, according to the allegation in the indictment, that he was a negro, then you may pass upon the question of jurisdiction in favor of this court having jurisdiction, and put it aside as one that is established beyond a reasonable doubt."

12th. It was error of the court to charge the jury as follows:

"Now, above all, in this case it is important to look at the character of the shooting; to look at the manner of it, because there are characteristics attending the doing of an act done in self-defense entirely different,
462 as a rule, from those done wantonally and wickedly and recklessly, in such a way as to show a wanton and reckless and wicked spirit. If a man is acting in self-defense, for example, when he has accomplished that defensive purpose he stops. He is conscious of it. The motive that prompts him to attack, then, is one of safety to himself. The one that prompts him to act where he kills wickedly and recklessly is called a wicked motive, which drives him on to destroy, wantonally and wickedly, human life. Therefore I say it is highly important that the character of the act of the man should be seen as it exists, the very nature of the shooting, the very fact that it is repeated and repeated. When that transpires it is to be taken into account to show the frame of the mind of the party who did the act as done."

13th. It was error of the court to charge the jury as follows:

"Can you kill another because of words used by him, and says that that is manslaughter? Not at all. The grade of crime is reduced because he who is killed at the time of the killing is doing some provocative act, some act that puts the mind of the party in such a condition that he is incapable of deliberation. That does not mean if he works himself into a state of deadly frenzy, works himself into a condition where he becomes reckless to human life, that he has a right to execute a wanton purpose; but it means that because of some act done by the party who is killed at the time of the killing, other than words used by him, that his mind is brought to a condition where he is not responsible for the act to the extent that it can be considered as a deliberate act, as one that is formed from a premeditated purpose, as that it grows out of a state of wantonness or wickedness upon his part. Now, the case where that usually arises is where it grows out of a conflict, or where it grows out of a case of the use of some great
463 indignity such as is sometimes taken into consideration by the law as a mitigating fact, or where it grows out of a conflict between the parties. The fact that one man may use words to another, opprobrious epithets, no matter how severe they may be, these are not mitigating facts, and they cannot be taken into account to reduce the grade of the crime, these things alone, but it is something that must be higher than that, something that must be more effective than that, to put the mind of the party in a condi-

tion where it is incapacitated from deliberation or premeditation. Now, the law says, in defining it, referring to the classes of cases where there is a conflict out of which this condition may arise, that voluntary manslaughter is the unlawful killing of another without malice on sudden quarrel, or in heat of passion. Where, upon sudden quarrel, two persons fight and one of them kills the other, this is voluntary manslaughter. And so if they upon such occasion go out and fight in a field, for this is one continued act of passion. In this and such like cases the law, kindly appreciating the infirmities of human nature, takes into account the provocative facts that exerted an influence because of the conduct of the party killed—a state of case, for example, where one man has cut the reins of another, and a third protests against it, and words follow between them, and because of these words one seizes a deadly weapon and fires and fires and fires it again upon the person who thus protests, or who may have used words against him—that is not a state of case that is mitigated, that is reduced in grade, because of the conduct of the party, for the conduct of the party who is killed would not be of that provocative character that the law contemplates as sufficient to put his mind in that inflamed condition where his act occupoes
464 a midway position between a case that can be characterized by the law of self-defense as one that is excusable and a case of murder. Now, that is what is meant by manslaughter. That is how the law defines it. It is for you to say what it is that exists in this case."

14th. It was error for the court to charge the jury as follows:

"Now, let us read what the law defining the right is in the hands of the citizen to take life. First. 'A man who is in the lawful pursuit of his business'—that is, he is doing what he had a right to do under the law at the time; that is the first thing that must exist—'A man who is in the lawful pursuit of his business is attacked by another under circumstances which denote an intention to take away his life'—the act must be of a certain character; it must have been the kind to indicate a purpose upon the part of Welch to take away the life of the defendant, or to do him great violence, to do him some enormous bodily harm. Now, if that state of case exist, the law says he may have lawfully killed John Welch, provided he used all the means in his power otherwise to save his own life, such as retreating as far as he could or disabling his adversary without killing him if it be in his power. The proposition is very simple and very easily understood. It is very brief. The cardinal principal underlying it is that he must have been in the right himself; he must have been doing what he had a right to do. If he was doing that which contributed to produce an act of violence between himself and Welch, or between himself and anybody else, at the time, which might lead to a deadly result, that might bring about a deadly affray, he was in the wrong; he was not in the right. If that state of case exists, then he was in the right, doing what he had a right to do, and was attacked by Welch in such a way as to indicate from the character of the attack a purpose
465 upon the part of Welch to take his life, or to do him great violence, he could kill Welch, provided he could not by the exercise of any other reasonable means save his life. That is the statement of the proposition of what is called real danger in short form. It means that the danger was danger to life, or of great violence to his person; that it then and there confronting him, and that he could not escape from it; dan-

ger that was then and there impending over him, and that he could only turn aside by striking and striking to the death the man from whom that danger came. If there was not any danger coming from Welch of that character, then this proposition passes out of the case."

15th. It was error for the court to charge the jury as follows:

"In this case it is claimed, and evidence has been offered to show that the deceased, John Welch, made threats against the life of this defendant. Not only that, but it is accompanied by the proposition that he was a man of lawless and reckless and dangerous character. It becomes necessary, therefore, that the court should take up sufficient of your time to tell you what figure these propositions cut in the case, provided you believe they are established. But that is the first thing you are to pass upon. And in seeing whether they are established or not, you are to consider the source from which the evidence comes; the very character of the witnesses as disclosed by themselves. If these allegations of threats made against the defendant come from men who are entitled to credit, you are to believe them and apply them, provided there is a state of case where you can apply them. But if they come from men who appear before you as confessed criminals, as men who are confessed fakirs, gamblers, and introducers of whiskey into that country, and guilty of crimes, you
466 have a right to take all these things into account in passing upon the credibility of the evidence, because evidence to be believed must come from a pure source. If a man says he has been seared by confessed crimes, if he has been a violator of the law, you are to take that fact into consideration in passing upon his evidence, because you are entitled to his past life, to know his past life, to enable you to see whether he is making a true statement or not. You are to take into consideration the further facts that it becomes easy to assert a threat that can not be contradicted. A man swears to you that A made threats against B, when nobody was present; A is in his grave, dead, and can not deny them, and it becomes an easy method of defense, often resorted to in this tribunal, often applied, and you are with care, with scrutiny, and diligence to look at the character of the man from whom such declarations come, to see whether they are of the character that in your judgment as fair-minded men, as men of uprightness and having consciences, of pure heart, can rely upon these statements. If you can not, cast them aside as so much stuff invoked for a purpose in the case. And the same with reference to character of deceased. It becomes easy to assert that a man is a man of lawless and desperate character when he is in his grave and can not refute that imputation; he can not resent it; he is gone; nobody to speak for him. And upon that proposition, as in the other, you are to see that the sources from which these declarations come is a source of such purity that you can depend upon it as being true."

16th. It was error for the court to charge the jury as follows:

"Now, what is reputation? It is the reflection of character. Character is the thing itself. It is that which a man makes day after day, and hour after hour, and year after year, by his bearing and conduct in the community where he lives. If that thing is reflected by the words spoken by men of credit, by men of standing, by men of pure character
467 standing before you, that such reputation is so reflected as that you can believe it, of course it is entitled to consideration and to be

taken in the case if it is applicable. But it is to come from men who are morally and mentally competent to know what it means. If a man is without character himself, if his action has been characterised by crime, if his conscience has been seared by criminal conduct, he is thus rendered incompetent to know what character is. He has none himself, and he is incompetent to determine when other men have one. And above all is it necessary, important, and essential to the interests of public justice that that justice not be defeated by men of that character scraped from the four corners of the earth. You are to see to it that it comes from a pure source; and then, again, you are to see to it that it is the reflection, not by keepers of dives and gambling hells, and violators of law, and prison convicts, but it is the reflection of honest and conscientious men; of men who possess character themselves; men of integrity; men whose judgments make up in your community your character that you prize so highly, because it is the opinion of honest, intelligent, judicious, and just men and women in your community. That is the source that character is to come from, and the only source from which you can derive it in a reliable way. If it does not come from that source, but comes from the source I have designated, cast it aside as so much worthless matter, invoked wrongfully in cases of this character."

17th. It was error for the court to charge the jury as follows:

"Now, provided you believe that these two characteristics, known as lawless and desperate characters, and deadly and violent threats against the defendant, are established because they come from the source
468 I have named, then you are to see what application is to be made of these conditions. You naturally inquire in this connection if a man can be killed because he is a man of bad character. Not at all. It would never do to leave that to the judgment of the defendant, or anybody else, because they would be mistaken about it; they would come to a wrong conclusion. There would be too many men killed upon that ground. What is the rule? When can a character cut a figure in a case? I might ask in this connection, as you would naturally ask, whether a man can be killed because of threats made against another. Not at all. If so, the law of assassination is an easy one of application. A wants B killed, and he goes and tells C that B has made violent threats against him; and C kills B, and then comes into court and asks to be excused for it, and if that was the law he could be excused; yet it might turn out afterwards that B never made any threats at all, and A being an assassin at heart and a coward besides, being anxious to have B killed, he gets an innocent man to do it by telling him a falsehood. The law does not deal in any such trickery as that. The law does not lay down any such proposition as that. The law is just in all its provisions. I now will give to you what state of case must exist where previous character of the kind I have named, or threats of a deadly nature, or of great violence to the defendant in this case can be considered by you. But if there is a question upon that point you may consider them as illustrating the occurrence at the time. Now, that is the figure that threats uncommunicated cut, or unless and desperate character unknown to the defendant. But if these threats were communicated and of a deadly nature, remembering in this connection the proposition I have already given you, that you are to be satisfied that they have been established so you can depend upon them, or if this lawless and

desperate character did exist, and one of these conditions, or both of them, was known to the defendant at the time of the killing of John
469 Welch, and John Welch was making an overt demonstration of a character, when coupled with the threats, that might lead to the conclusion that he had a deadly purpose or a dangerous design upon the person of the defendant, then they may be taken into account in that connection and for that purpose. Now, let us see whether this is the law or not. In this same case which I have read from—the case of Wiggins v. The People of Utah—the doctrine of threats, as bearing upon the question of previous threats, was fully collated by Justice Clifford in his dissenting opinion, and stated in a better way than I can state it, and therefore I read them to you: "Decided cases, too numerous for citation, are reported in which it is held that evidence of the bad character of the deceased is not admissable in an indictment for felonious homicide, for the reason that it can not have any effect to excuse or palliate the offence"—this means bad character alone.

"Courts of justice everywhere agree that neither the bad character of the deceased nor any threats that he may have made forfeits his right to life, until, by some actual attempt to execute his threats or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief on the part of the slayer that it is necessary to deprive him of life in order to save his own or to prevent some felony upon his person." Now, you see, John Welch must have been doing something that indicated a deadly purpose at the time—that indicated, when taken in connection with the threats, a lawless and desperate character, a deadly purpose upon his part, then the threats and the lawless and desperate character may be taken into account in the case.

"Jurists and text writers appear to concur that antecedent threats alone, whether communicated or not, will not justify a subsequent deadly
470 assault by the other party, unless the party who made the previous threats manifests at the time of the act a design to carry the threat into immediate effect.

"Actual danger of the kind, or a reasonable belief of such actual danger, must exist at the time, else the justification will fail. Repeated threats, even of a desperate and lawless man, will not and ought not to authorize the person threatened to take the life of the threatener, nor will any demonstration of hostility, short of a manifest attempt to commit felony, justify a measure so extreme."

18th. It was error for the court to charge the jury as follows:

"Fourth." This instruction is given as modified. "That in determining as to the existence of malice in the defendant by which the killing may have occurred the jury are instructed to carefully weigh and consider the conduct of the deceased at and immediately preceding the killing, as well as the previous threats made against the life of the defendant, as well as the character of the deceased for being a desperate and dangerous man, provided under the law I have given you previous threats and a lawless and desperate and dangerous character of the deceased, John Welch, can be considered by you. And that the jury must examine with the aid of all the facts and circumstances in the case as to the condition of the mind of the deceased in order to determine as to the danger, if any, which appeared to the defendant from the hand of the deceased at the time of

the killing." This was the fourth instruction asked by the defendant and given by the court, with the words "provided under the law I have given you, previous threats and lawless and desperate and dangerous character of the deceased, John Welch, can be considered by you."

To which modification the defendant at the time excepted. The defendant asked the court to instruct the jury as follows:

19th. It was error for the court to refuse to charge the jury as asked by the defendant, the following proposition of law:

471 "Fifth. That if the jury believed from the evidence that the defendant at the time of the killing honestly believed from the conduct of the deceased that he was in imminent danger of his life or great bodily harm at the hand of the deceased, they should acquit."

20th. It was error for the court to refuse to charge the jury as follows:

"Sixth. That if the jury believed from the evidence that the defendant, as a reasonable man, and situated as he was at the time of the killing, believed that he was in danger of his life or great bodily harm at the hands of the deceased, from all he saw and knew of the conduct and purpose of the deceased, at the time he shot and killed the deceased, the jury should acquit, although there may have been no actual danger to the defendant."

21st. It was error for the court to refuse to charge the jury as follows:

"Eleventh. That if the jury believed from the evidence that the deceased, John Welch, was a member of the Creek tribe of Indians, that is, if he was married to a citizen of the Creek Nation a*dn* resided in that nation, and the killing occurred in the Creek Nation, then this court is without jurisdiction and the jury should acquit."

Wherefore the above stated errors is considered, the said defendant prays that the judgment and sentence against him be reversed and a new trial be granted him.

CHARLES SMITH,
By THOS. MARCUM,
C. J. FREDERICK, and
J. B. RUTHERFORD,
His Attorneys.

(Endorsed on back:) Filed April 29, 1895. S. Wheeler, clerk. By I. M. Dodge, D. C.

472 *Petition for writ of error.*

UNITED STATES COURT,
Western District of Arkansas:

UNITED STATES
vs.
CHARLES SMITH.

To the Clerk of the Circuit Court of the United States for the Western District of Arkansas:

Your petitioner, Charles Smith, represents that at the February term, 1895, of said court he was convicted on an indictment charging him with the crime of murder, and that the said court has pronounced judgment

and sentence of death upon this petitioner upon the verdict of this jury convicting him as aforesaid. Your petitioner alleges that in the record and proceedings in the trial of said cause there is great and manifest error, to the prejudice and great damage of your petitioner. He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said circuit court in said cause removing said cause and the record therein to the said Supreme Court in order that the same may be there examined and if error be found that judgment and sentence against him therein may be reversed.

CHARLES SMITH,
By THOS. MARCUM,
C. J. FREDERICK, and
J. B. RUTHERFORD,
His Attorneys.

(Endorsed on back:) Filed April 29, 1895. S. Wheeler, clerk. By I. M. Dodge, D. C.

473 *Poverty affidavit.*

UNITED STATES COURT,
Western District of Arkansas:

UNITED STATES }
vs.
CHARLES SMITH. }

I, Charles Smith, the defendant in the above-stated cause, do solemnly swear that I am not possessed of sufficient means, and am actually not able to procure the same, to prosecute the appeal taken in said cause in the Supreme Court of the United States.

I therefore pray that it be prosecuted in forma pauperis.

CHARLES SMITH.

Subscribed and sworn to before me this 27 day of April, 1895.

STEPHEN WHEELER, *Clerk.*
By J. D. BERRY, *D. C.*

(Endorsed on back:) Filed April 29, 1895. S. Wheeler, clerk. By I. M. Dodge, D. C.

474 UNITED STATES OF AMERICA, ss:

The President of the United States, to the honorable the judges of the circuit court for the western dist. of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between the United States, plaintiff, and Charles Smith, defendant, a mani est error hath happened, to the great damage of said Charles Smith, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein

given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 60 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 2 day of May, in the year of our Lord one thousand eight hundred and ninety-five.

[SEAL.] STEPHEN WHEELER,
Clerk of the Circuit Court of the United States
for the Western Dist of Ark.,
By I. M. DODGE, *D. C.*

Allowed by

Justice of the Supreme Court of the United States.

475 UNITED STATES OF AMERICA, ss.

To Jas. F. Read, esq., U. S. att'y for the western district of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Arkansas, wherein Charles Smith, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Mellville W. Fuller, justice of the Supreme Court of the United States, this 2nd day of May, in the year of our Lord one thousand eight hundred and ninety-five.

[SEAL.] I. C. PARKER,
U. S. Dist. Judge for the Western Dist. of Ark.,
holding Circuit Court.

On this day of , in the year of our Lord one thousand eight hundred and ninety- , personally appeared before me the subscriber, , and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the day of , A. D. 189 .

I, Jas. F. Read, U. S. attorney for the western dist. of Arkansas, hereby accept service of the within citation and waive service by an officer, this 2nd day of May, 1895.

JAS. F. READ,
U. S: Dist. Attorney for the Western Dist. of Ark.

476 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the record and proceedings in the case of U. S. vs. Charles Smith. The original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 2nd day of May, A. D. 1895.

[SEAL.] STEPHEN WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

(Indorsement on cover:) Case No. 15895. Term No. 1011. Charles Smith, plaintiff in error, vs. The United States. W. Arkansas, C. C. U. S. Filed May 7, 1895.

18039——18

○

1 In the United States court for the western district of Arkansas.

UNITED STATES
vs.
CHARLES SMITH. } Murder. Indictment numbered 100.

Comes the said defendant and demurs to the said indictment numbered 100, wherein defendant is charged with the murder of John Welch, and assigns as a ground of demur—

First. Because said indictment does not state facts sufficient in law to constitute a crime within the jurisdiction of said court.

Second. Because said indictment fails to show on its face that either the defendant or deceased are citizens of the United States or noncitizens of one of the Indian tribes, nor does it negative the supposition that both the defendant and the deceased are members of one of the Indian tribes within the Indian country in the district mentioned in the caption.

Wherefore he prays, &c.

CHAS. SMITH.
By FREDERICK & RUTHERFORD,
MARCUM, FEARS and WIGGINS,
Attorneys for the said defendant.

(Endorsed on back:) Filed in open court, Feb. 15, 1895. S. Wheeler, clerk.

2 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the demurrer to indictment #100, in the case of U. S. v. Charles Smith, the original of which remains on file in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court at Fort Smith, in said district, this 28 day of June, A. D. 1895.

[SEAL.] STEPHEN WHEELER, *Clerk*,
By I. M. DODGE, *D. C.*

3 In the Supreme Court of the United States. October term, 1895.

CHARLES SMITH, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES. } No. 608.

Stipulation.

It is hereby stipulated that the foregoing certified copy of demurrer in the above-entitled cause, which was inadvertently omitted from the tran-

script of the record transmitted to this court, may be added to the record now on file.

C. J. FREDERICK,
THO. MARCUM,
Counsel for Plaintiff in Error.
HOLMES CONRAD,
Solicitor-General.

4 (Indorsement on cover:) Case No. 15895. Supreme Court U. S. October term, 1895. Term No. 608. Charles Smith, plff. in error, vs. The United States. Stipulation and addition to record. Filed July 24, 1895.

Office Supreme Court U. S.
FILED.
MAY 20 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

CHARLES SMITH, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. ~~1011.~~ 608

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

CHARLES SMITH, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 1011.

MOTION TO ADVANCE.

The plaintiff in error was indicted in the circuit court of the United States for the western district of Arkansas for having shot and killed one John Welch, a negro and not an Indian, on September 27, 1894, at the Creek Nation in the Indian country; and also for having shot and killed one Robert Marshal, an Indian policeman, at the same time and place. The indictments were consolidated, and on February 20, 1895, the defendant was found guilty of murder under the first indictment, and of manslaughter under the second, and has been sentenced to be hanged.

The Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing on such early day during the next term as may be convenient to the court.

17531

Notice of this motion has been served on the defendant and his counsel in the court below, and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

Office Supreme Court U. S.
FILED.
NOV 8 1895
JAMES H. McKENNEY,
CLERK.

No. 1011. 608

IN THE SUPREME COURT

OF THE

UNITED STATES.

CHARLES SMITH, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

ELEVATOR JOB PRINT FORT SMITH.

No. 1011.

IN THE SUPREME COURT

OF THE

UNITED STATES.

CHARLES SMITH, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

May it please the court :

In presenting our views in behalf of the plaintiff in error herein, we deem it proper to do so in the order of the errors assigned in the record, and the first is as to the overruling of the demurrer to indictment numbered 100. The demurrer is in words as follows to-wit :

"Comes the said defendant and demurs to the said indictment numbered 100, wherein the defendant is charged with the murder of John Welch and assigns as a ground of demurrer.

First—Because said indictment does not state facts sufficient in law to constitute a crime within the jurisdiction of said court.

Second—Because said indictment fails to show on its face that either the defendant or the deceased are citizens of the United States or non-citizens of one of the Indian tribes, nor does it negative the supposition that both the defendant and the deceased are members of one of the Indian tribes within the Indian country in the district mentioned in the caption."

The order overruling said demurrer is found on page six of the record.

In support of the demurrer we cite Articles two of the treaty of June 14th, 1866, with amendments of July 19th, 1866 and accepted July 23, 1866, between the United States and the Creek tribe of Indians which is as follows to-wit:

"The Creeks hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in the punishment of crimes, whereof the parties have been duly convicted, in accordance with laws applicable to all members of said tribe, shall ever exist in said nation; and inasmuch as there are among the Creeks many persons of *African* descent, who have no interest in the soil, it is stipulated that hereafter these persons lawfully residing in said Creek country, under their laws and usages or who have been thus residing in said country and may return within one year from the ratification of this treaty, and their descendants and such others of the same race as may be permitted by the laws of said nation to settle within the limits of the jurisdiction of the Creek nation as citizens thereof shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds; and the laws of said nation shall be equally binding upon and give equal protection to all such persons, and all others, of

whatsoever race or color, who may be adopted as citizens or members of said tribe."

The indictment charges the crime to have been committed in the Creek country where under the treaty mentioned colored people would naturally be presumed to be citizens and members of that tribe. The allegation that the deceased Welch was a "negro and not an Indian" does not refer even by implication to jurisdictional citizenship or membership of the Creek tribe of Indians, because admitting all the facts stated in the indictment as to jurisdiction to be true it leaves the indictment totally without any allegation of jurisdiction in the court below.

It is admitted in the treaty mentioned that there are *many* persons of African descent in the Creek nation and as it is true as a matter of common history that most of the membership of the Creek tribe are people of African descent—more of them than any other race who constitute the Creek tribe—and hence the allegation that the deceased Welch was a "negro" and not an Indian does not give the court below jurisdiction, there being no allegation as to the citizenship of the defendant. A negro is not an Indian, it is true, bnt it is not true that all negros are not members of the Creek tribe of Indians, the blood or birthplace of a party has nothing to do with the proper designation of Creek membership which is a fact to be alleged and proven like any other material fact.

The learned Judge below, it would seem, gave little attention to the case of Westmoreland against the United States, 155 U. S. page 545, ~~while~~ which he cites in support of his decision overruling the demurrer. Had he been governed by that case

the demurrer would and should have been sustained *we* think.

In the Westmoreland case the indictment alleges that "defendant and deceased were *not* citizens of the Indian Territory" and it seems that this court was mainly governed by that allegation in its affirmance of that case. The court in that case say: "Force must be given in this term in the indictment, and while it may be conceded that it is not the most apt way to describe citizenship in the Indian tribe, yet it is not an unreasonable construction to hold that it refers to all citizenship which could possibly be acquired in the Indian Territory, including therein citizenship in any Indian tribe domiciled within such limits." Again the court say: "At least as no challenge was made of the indictment, prior to the time and the question was only raised by motion in arrest, etc."

In the case at bar the indictment contains no such allegation as that quoted in the Westmoreland case. The remarks of the court below in passing upon this question in overruling the motion for a new trial at page 251 of the Record is mere assumption.

The learned Judge of the court below said: "The ground for that demurrer was that there was not sufficient description of the citizenship of the parties. I believe the allegation was that the party was a negro, and not an Indian That doctrine has recently been before the Supreme court of the United States in the case of Westmoreland vs. U. S. 155, U. S. 545, in which it held that an averment in an indictment for murder that the defendant "is a white person and not an Indian is sufficient to show that he is outside of the first clause of the Revised Statutes section 2216—that is that he was an Indian." It

seems to us that that is conclusive upon this proposition, because it is just the same, in effect, to allege a man is a negro and not an Indian as it is to allege he is a white man and not an Indian. It is the allegation of a jurisdictional fact. Either allegation means that he is a citizen of the United States. All persons are jurisdictional citizens of the United States except Indians who are charged with crime against other Indians."

We do not think such allegations are the same as to white persons as to negroes, because all white Americans were at some time citizens of the United States, but the negroes who were slaves in the Creek nation never were citizens of the United States, but are natives of the Creek nation and passed by the treaty aforesaid from the condition of Creek slaves to Creek citizens, and under said treaty "shall enjoy all the rights of natfve citizens * * * and the laws of the Creek nation shall be equally binding upon them and shall give them equal protection with other Creek Indians." Section 2146 of the Revised Statutes of the United States read as follows: "The preceding section shall not be construed to extend to any *case* where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectfvelly."

SECOND ASSIGNMENT OF ERRORS.

The defendant was tried upon two distinct indictments for two distincts homicides, both alleged to be murder and two distinct verdicts were rendered by the same jury in the same trial, one for murder and the other for manslaughter; which shows that the crimes charged were not of the same class or

grade of crimes, and these verdicts show that the evidence used to support the one, was not the same as that which supported the other. Without going into details with reference to the testimony we simply say that taking it altogether, it shows that deceased Welch and Marshal were not acting together in the conflict in which the killing occurred, but that the shooting of Welch was prior to the killing of Marshall.

The evidence shows that the difficulty in which Welch was killed was exclusively between Welch and the defendant. Marshall was not connected with that difficulty, but came upon the scene after the shooting at Welch had ceased, and fired upon the defendant when defendant's back was towards him, and the defendant turned and fired the fatal shot at Marshall. According to these verdicts the killing of Welch shows malice on defendant's part, while in the killing of Marshall, there was no malice. The nature of the defense was different in the two cases, and must necessarily have confounded the defendant in making them. The proof shows that Welch was a private citizen, while Marshall was an Indian policeman, and had been a United States deputy marshal. Their positions were different, which among other things, made it important for defendant to select different jurors in the two cases, and by the consolidation of the cases he was deprived of this privilege, as well as twice the number of challenges.

This court in the case of Pointer vs. the U. S. 151 U. S. page 396, said: "The rule in England is not materially different. In 1 Chilty's criminal law 252, 253, it is said: "In cases of felony, no more than one distinct offence or criminal transaction at one time, should regularly be charged upon the

prisoner in one indictment, because, if that should be shown to the court, before plea, they will quash the indictment lest it should confound the prisoner in his defense, or prejudice him in his challenge to the jury; for he might object to a juryman's trying one of the charges, though he might have no reason to do so in the other," and various other cases cited.

The evidence to support the charge for killing Welch could throw no light upon the transaction in which Marshall was killed, because one was over before the other began—and might have just as well been a week or months apart, as one minute, for in either case, they are different transactions. Section 1024 of the Revised Statutes we take it does not mean that the crimes are connected together in point of time. In the Pointer case the two deceased were killed at the same time by the same man and with the same weapon and was actuated by the same motive. Pointer denied the killing, while in this case the defendant admitted the killing and pleaded self-defense.

THIRD ASSIGNMENT OF ERROR.

Is the refusal of the court below to allow William Gentry a witness for the defense to answer the question and testify as to the desperate character of the deceased, Welch, and as to his superior physical strength and the relative strength of said Welch and the defendant. Record pages 218 and 219.

"Upon the trial of an indictment for murder by stabbing with a knife, evidence that deceased was a man of great physical strength and of ruffianly disposition, which was known to the defendant at the time of the killing, is competent as

tending to explain the defendant's motive in using his knife in self-defense, and also as bearing upon the question as to the grade of the guilt of the defendant."

Wisconsin Supreme Court, State vs. Nett, November, 1880, Vol. 2, Criminal L. Mazagine, Page 78, and cases cited.

FOURTH ASSIGNMENT OF ERROR.

This error is based upon the allowance by the court below, of the district attorney to ask the defendant witness, William Gentry, if he had ever been arrested on any charge; if he had ever been arrested for perjury, and if the case was not now pending against him at Muskogee, Such questions are not competent. Record pages 142 and 143.

Anderson vs. The State, 34th Ark., Page 257.

This question regardless of the answer proves nothing—does not go to the mis-conduct of the witness and hence does not affect his credibility, and we think it is illegal.

FIFTH, SIXTH AND SEVENTH ERRORS ASSIGNED.

We think this was competent because if it was Welch's habit to carry a pistol it might well be inferred that defendant knew it as he had known him nearly all his life as shown by his testemony at page 191, which is not contradicted, and this evidence is competent as tending to show the grade of the offence.

EIGHTH ASSIGNMENT OF ERROR.

We think the evidence sought to be elicited from the witness Roswell Mackey is competent in connection with the evidence sought to be elicited under the 5th, 6th and 7th assignment of errors and in connection with the testimony of the defendant's witnesses as to the fact that Welch at the time defendant first shot him was advancing upon the defendant in a menacing attitude. Namely: Roswell Mackey Record page 179; James Smith, page 182; Defendant Smith, page 194; Alex. Coats, page 149; Wm. Gentry, page 133; C. C. Ransome, page 136; Fred Virgil, page 149; John Vann, page 159; Charles Sheppard, page 163.

The testimony of Scott Gentry, one of the prosecuting witnesses shows that defendant siezeed his pistol after Welch had run him into his (defendant's) own tent, and not until then, did he get a pistol, and this we think, negatives the idea of premeditation. We think the law will sustain us in the proposition, that if it was the habit of Welch to carry a pistol, and if his general character for being quarrelsome and over-bearing was bad, and he was greatly superior in physical strength to that of the defendant, and that Welch, at the time he was shot, was advancing upon the defendant, as stated by defendant's witness, it is altogether competent to explain the motive which actuated the defendant in firing the fatal shot.

NINTH ASSIGNMENT OF ERROR.

The fact appeared from the uncontradicted testimony of James Smith, that the witness was once tried and acquitted for murder, the court below on page 255 in overruling motion for

a new trial says John Smith, (intended for James Smith), was acquitted, and we think it unnecessary to cite authority to establish the error of the court below upon this ~~pistol~~ point.

TENTH ASSIGNMENT OF ERROR.

We think it was error to allow the prosecution to introduce Frank Parke without giving the defendant notice before hand, as it gave defendant no opportunity to meet it. Rev. Stats, U. S. Section 1033, U. S. vs, Neverson, 1st Mackey 152, U. S. vs. Williams, C. C. 178. The evidence of Frank Parke was original, and not in rebuttal. See Record, page 220.

The 11th, 12th, 13th, 14th, 15th, 16th, 17th errors assigned, go to the charge of the court below, and taken together, they are argumentative, abusive ofdefendant's witnesses, disparaging to their testimony, and well calculated to have the effect, and did have the effect no doubt, of impressing upon the jury the adverse opinion of the court to the defendant, and undoubtedly produced an improper influence upon the jury, in arriving at the verdict complained of.

EIGHTEENTH ERROR ASSIGNED,

Is as to the modification, by the court, of the instruction asked by defendant.

NINETEENTH ERROR ASSIGNED,

Is as to refusal of the court to give instructions asked by the defendant, which is the law, as we think. Record page 250.

TWENTIETH ASSIGNMENT OF ERROR,

Is as to same point, and was asked by the defendant, but refused by the court. This instruction as asked, was based

upon the idea of apparent danger, which is as fully recognized in the law as real danger. Record page 250.

TWENTY-FIRST ASSIGNMENT OF ERROR,

Is as to refusal of court to instruct the jury as to citizenship on question of jurisdiction and should have been given, as it is the law, as shown in our argument, and citation of authorities, on the first assignment of error. See the treaty between U. S. and the Creek or Muskogee tribes of Indians, ratified in 1866.

Respectfully submitted,

MARCUM & FEARS,
C. J. FREDERICK,
Of Counsel.

WM. M. CRAVENS,
Att'y for Def't.

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In the Supreme Court of the United States.

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Charles Smith, plaintiff in error, was indicted for the murder, at the Creek Nation in the Indian Territory, of one John Welch, a negro and not an Indian; and by a separate bill on the same day was indicted for the murder of one Robert Marshal, an Indian United States deputy marshal. These murders were committed as part of one transaction on September 27, 1894. By order of the court the causes were consolidated to be tried together. Smith was tried before Judge Parker and a jury, and by separate verdicts found guilty of murder in the Welch case and of manslaughter in the Marshal case. He has

been sentenced to be hanged for the murder of Welch (p. 9). His petition for a writ of error (p. 262) and the writ of error itself (p. 263) relate only to this judgment. No judgment and sentence seem to have been entered upon the verdict for manslaughter for the killing of Marshal. Nor do the assignments of error raise any serious question as to that branch of the case. If, therefore, he should be granted a new trial under the Welch indictment, his sentence (if any has been pronounced) under the Marshal indictment will stand, or if no sentence has yet been pronounced, one will be in order.

The evidence is transmitted in full by question and answer, as is usual in records coming from that district. Every effort of this Department has been exhausted in the attempt to secure proper bills of exceptions therefrom.

STATEMENT OF FACTS.

An examination of the testimony will show that the verdict of the jury was very lenient to the prisoner in finding him guilty only of manslaughter in the Marshal case. He admitted that he shot both men, and the shooting was altogether wanton and uncalled for. His testimony is to be found at pages 191–203. His plea in the Welch case was self-defense, but he did not deny the undoubted fact (p. 18) that Welch had no pistol or other weapon with him. He claims that Welch said: "God damn him; I will kill him," and put his right hand back to his hip pocket, whereupon Smith immediately shot (p. 196). He attempted to claim that Welch had threatened his life, but had to admit that after the threats

Welch had actually tried to pawn his own gun to him (pp. 194, 195). The prosecution's version of the killing may be found at pages 17, 18, 39, 51, 60, 87, 98, 120, 125.

ASSIGNMENTS OF ERROR.

We take up the assignments separately.

I. It is claimed that the court should have sustained the demurrer to the indictment. One of the objections specified in the demurrer was that the indictment "fails to show on its face that either the defendant or deceased are citizens of the United States or noncitizens of one of the Indian tribes, nor does it negative the supposition that both the defendant and the deceased are members of one of the Indian tribes within the Indian country in the district mentioned in the caption." (Stipulation and addition to record, p. 1.)

In answer to this it may be sufficient to quote from *Westmoreland* v. *United States* (155 U. S., 545, 548), where the court, by Mr. Justice Brewer, say:

> The term "Indian" in § 2146 is one descriptive of *race*, and therefore the defendant, described as a white man and not an Indian, is shown to be outside the first two clauses of § 2146.

The court also repeat with approval the following language, used in *United States* v. *Rogers* (4 How., 567, 573):

> Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not within the exception in the act of Congress.

II. The claim that it was error to consolidate the two cases is answered by *Pointer* v. *United States* (151 U. S., 396, 400).

III. This assignment was apparently based on the exception at page 135; but the exception is not based upon any objection or motion to strike out.

IV. William Gentry, one of defendant's witnesses, testified that he had been arrested at Muscogee for perjury (p. 142). Defendant's counsel then objected to the question whether he had been arrested (the second question previous). The court said, "I think it is competent." Counsel said, "We save an exception." There was no motion to strike out. After a question has been answered, and especially when the subsequent question has also been answered, most of the harm on a jury trial has already been done. If the testimony is irrelevant or incompetent the other party may ask that it be stricken out or that the jury be instructed not to consider it. Whether it be stricken out (a merely formal act, as the jury never see the record) is in the discretion of the court. (1 Thompson on Trials, §§ 715, 716; *Pontius* v. *People*, 82 N. Y., 339, 347; and other cases cited on this point in the brief for defendant in error in *Swearingen* v. *United States*, No. 567 of this term.) If there had been a motion to strike out here, and if the motion had been denied, its denial would have been a very proper exercise of the court's discretion, for the objection was made in very bad faith. It was defendant's counsel himself who commenced asking adverse witnesses whether they had been

arrested (pp. 77, 86, 107, 130; compare *New York Elevated Railroad* v. *Fifth National Bank*, 135 U. S., 432). For these reasons it is respectfully submitted that it is unnecessary in the present case to discuss the conflicting authorities upon this point. (See 1 Thompson on Trials, § 467; *Hill* v. *State* (Nebraska), 60 N. W. Rep., 916, 919, and cas. cit.; *Carroll* v. *State*, 32 Tex. Crim. App., 431, 434; *People* v. *Hite*, 8 Utah, 461, 475; *Van Bokkelen* v. *Berdell*, 130 N. Y., 141.)

V, VI, VII. The court refused to allow testimony that Welch, one of the deceased, was in the habit of carrying a pistol. There was no attempt to connect this testimony by showing or offering to prove that defendant knew it if Welch had the habit; and in the absence of such proof Welch's habit was immaterial, it appearing that he had no pistol on this occasion.

VIII. It is unnecessary to consider this exception, which is based on no objection and relates merely to a remark of the court that a certain question was incompetent; which question, however, was admitted and answered (p. 209), and the testimony thus elicited was submitted by the court to the jury, as shown by one of the assignments of error (p. 259).

IX. This assignment is not based on any exception.

X. This assignment raises the question whether a witness, as to whom the defendant had never been served with any notice before the trial, can be introduced on behalf of the Government in a capital case. The rule

relied upon by plaintiff in error does not, we submit, apply to rebuttal testimony. (See *State* v. *Gillick*, 10 Iowa, 98; *State* v. *Ruthven*, 58 Iowa, 121; *State* v. *Huckins*, 23 Nebr., 309; *Gardner* v. *People*, 3 Scam., 83, 89; *Gates* v. *People*, 14 Ill., 433, 436; *Logg* v. *People*, 92 Ill., 598; *State* v. *Cook*, 30 Kan., 82; *Hill* v. *People*, 26 Mich., 496.) Rev. St. § 1033 relates to witnesses "for proving the indictment." Upon this point we beg to refer the court to the fuller discussion in the brief for defendant in error in *Goldsby* v. *United States*, No. 620 of this term.

XI. It is claimed that the court had no jurisdiction of the Welch murder, because Welch, though a negro, had married a Creek Indian woman. This attempts to raise a question of Creek law. It may be questioned whether the court has judicial knowledge of the Creek law in the absence of proof. Judge Parker, in his opinion on the motion for a new trial, says that that law is to the contrary (p. 252). The question, however, is disposed of by *Westmoreland* v. *United States* (155 U. S., 545, 548), and authorities therein cited. Mrs. Welch denied that he was a Creek citizen (p. 11).

XII–XVIII. These assignments relate to the instructions of the court. As usual, long passages are taken from the instructions, and the exceptant does not point out of which of the many propositions contained in each of these passages he really complains. We might quote the opinion of this court delivered through Mr. Justice Harlan in *Baltimore and Potomac R. R.* v. *Mackey*, (157

U. S., 72, 91–2): "It is sufficient to say that the exception in each instance was in gross to a series of propositions, some of which, at least, were clearly right. Neither exception can be regarded. (*Beaver* v. *Taylor*, 1 Wall., 637; *Moulor* v. *Am. Life Ins. Co.*, 111 U. S., 335, 337; *Conn. Life Ins. Co.* v. *Union Trust Co.*, 112 U. S., 250, 261; *Burton* v. *West Jersey Ferry Co.*, 114 U. S., 474, 476.)"

Certain passages in the fifteenth and sixteenth assignments of error would tend possibly to make the jury believe that testimony of confessed criminals could not be taken into consideration for any purpose whatever, but must be altogether thrown out of the case. The learned judge says: "Evidence to be believed must come from a pure source;" and again: "If a man is without character himself, if his action has been characterized by crime, if his conscience has been seared by criminal conduct, he is thus rendered *incompetent* to know what character is. He has none himself, and he is incompetent to determine when other men have one." And, referring to the testimony of certain "keepers of dives and gambling hells," etc., he says: "Cast it aside as so much worthless matter." Certainly no such position was taken by the district attorney, who himself introduced similar testimony (pp. 86, 96). It is hard to believe that the court would have allowed these passages to stand unqualified if his attention had been separately called to them. The court's opinion on the motion for a new trial indicates this. His view of the matter is there set forth as follows (pp. 254, 255):

> I assert it as a fact, and it is a very broad assertion, because if there ever was a place where perjury has been piled mountain high, it is here. But I

assert that there never was a case tried in this court where there was the same array of villians, fakirs, gamblers, and criminals invoked as there was in this case. Let us see who they are by their own confession, by their own admission. Here is C. C. Ransom: Arrested once at Muscogee for murder, brought to Fort Smith, and acquitted; served two or three times in Muscogee jail for gambling; twice in Fort Smith jail for fighting and being drunk. Fred Virgil: Arrested for larceny at Parsons, Kans.; convicted, and served three months in the county jail. John Vann: Arrested upon a whisky charge and served ninety days at this place; arrested for horse stealing, and discharged before the commissioner; arrested for arson; arrested for disturbing the peace, and acquitted. Charles Shepard: Arrested for whisky twice; plead guilty; thirty-five days in jail the first time and fifty days the second time, both in this court; arrested on application for peace warrant; was running a gambling game at the fair when the shooting occurred; was at three of the payments last summer with a gambling device. Roswell Mackey: Arrested twice for whisky, served jail sentence each time in this court. John Smith: Arrested for murder, acquitted in this court; arrested for gambling and acquitted; once and a while, a gambler. A. B. Brown: Arrested at Muscogee on whisky charge, case pending; formerly run gambling house in Muscogee. Charles Smith, the defendant: Arrested for murder, convicted of manslaughter, sentenced to ten years; arrested on whisky charge twice, plead guilty in this court; arrested for gambling twice, at Muscogee. Alfred Shoat: Arrested for fighting and gambling; sometimes a gambler. Dave Roberts: Arrested for whisky, ignored by the grand jury. That is the array of testimony, with

the exception of one witness, and that one seems to have escaped arrest. Whether he was engaged in the various violations of the law with these other witnesses I know not. But that is the array of witnesses upon which the comments of the court, so-called severe comments, harsh comments in the language of the motion, put there evidently with the expectation that the Supreme Court might lay hold of something of that kind and reverse the case on that ground, looking at the assertion in the motion rather than to what the court in its charge said as to the array of witnesses and their testimony, such as were offered in this case, and who the jury was seriously asked to believe. There is not a man in private life that under any circumstances would believe a word they would say if they had a single grain of interest that would prompt them to tell a lie. They were manifestly liars from their method of testifying on the stand. Their character was so blackened and seared with crime that it was impossible for them to tell the truth, *and the court might have given that as its opinion to the jury, but it did not see proper to do so.* Of course it can not affect the verdict of the jury now, by the court truthfully expressing its opinion as to what was the status of this crowd of men who were introduced here for the purpose of securing a false verdict.

The rest of the passages covered by these assignments of error seem to contain nothing requiring further comment.

XIX, XX. These assignments relate to refusals to two requests to charge upon the issue of self-defense. It was proper to deny them, because defendant's twelfth request, covering the same ground, was accepted by the court (p. 242). We therefore do not consider these.

It may be remarked in this connection that many of the propositions maintained by the defendant are accepted by the court and incorporated into his charge (pp. 241, 242).

XXI. See XI, *supra*.

EDWARD B. WHITNEY,
Assistant Attorney General.

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I. The first assignment of error relates to the overruling of the demurrer to the indictment numbered 100. This indictment alleges that John Welch, the person murdered, was "a negro and not an Indian." Counsel

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base an ingenious argument upon the second paragraph of the Creek treaty of 1866, claiming that as there are negroes belonging to the Creek tribe who never were American citizens, therefore an indictment for murder committed in the Indian country upon a negro is insufficient unless it alleges categorically that the negro was not a Creek citizen. The Westmoreland case, referred to by the undersigned in his brief heretofore filed on behalf of the Government, is attempted to be distinguished by basing that decision solely on the allegation contained in the indictment then under consideration, that the person was not "a citizen of the Indian Territory," and upon the fact that the question had not been raised by demurrer in that case.

It will be noticed that the argument for plaintiff in error assumes that it is necessary in criminal pleading to negative every possible exception to the jurisdiction of the court. It is undeniable that Judge Parker's court has general jurisdiction over that Territory in murder cases in the absence of the statutory exceptions. It is undeniable also that Welch, the murdered man, may have been a citizen of the United States with no rights of citizenship in the Creek Nation. This, indeed, was shown on the trial of the case to be the fact, by the testimony of his widow, Louise Welch (p. 11). It is argued, however, that as a negro *may be* a Creek citizen and not a citizen of the United States, and as the word "Indian" in § 2146 of the Revised Statutes is descriptive of race rather than citizenship, hence the indictment fails to exclude the possibility of the case coming under one of the statutory exceptions.

It is to be noticed that the same principle would apply if the allegation in the indictment were that the murderer or the murdered man, as the case might be, was "a white man and not an Indian;" for the second article of the Creek treaty provides for adoption of persons "of whatsoever race or color." (14 Stat., 786.) Such white men may be Mexicans or Europeans who have never acquired any of the rights of American citizenship, and therefore, according to the argument for plaintiff in error, may not be responsible in any way to the laws of the United States.

It will be noticed also that the strict rule of pleading contended for by plaintiff in error would have an application elsewhere than in the Indian country. It will be necessary in any indictment, for instance, to allege, that the person charged with crime is not under special protection as a foreign ambassador.

Various answers may be made to the prisoner's contention; arguments which were suggested to the court in the Westmoreland case, but not extended at length on account of the haste with which the brief in that case was made, and the conclusive character of the other line of argument, which was adopted by the court in its decision.

(A) The phrase "a negro and not an Indian" shows that the pleader used the word "Indian" otherwise than in the racial sense. If he had used that word in the same restricted sense in which it is used in the statute, it would be found unnecessary to charge that the murdered man was a negro. The words "negro" and "Indian" would

have been exclusive of each other. To say that a man is "a negro and not an Indian" is to imply that there may be negroes who are also Indians. It is very clear that the pleader intended to charge, and must have been understood as charging, that the murdered man was a negro and not a citizen of any Indian tribe.

Hence, whatever inaccuracy there may have been in his language, the inaccuracy was one of form, not substance, and was cured by § 1025 of the Revised Statutes, unless it could have misled the defendant; and it is very clear that he could not have been misled.

(B) The charge in the Westmoreland indictment (*Westmoreland* v. *United States*, 155 U. S., 545) that the murderer was not "a citizen of the Indian Territory," was intended to avoid the effect of a certain article of the Choctaw and Chickasaw treaty, which preserved to each squaw man and other adopted citizen of either of those nations the right "to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he were a native Choctaw or Chickasaw" (p. 548). It was not necessary to insert such a clause in the present indictment, because there is no such provision in the Creek treaty. (14 Stat., 785–790.) Negroes and adopted whites are given "all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of the said nation shall be equally binding upon, and give equal protection to all such persons." (Article II.) But there is no clause guaranteeing any right of trial or punishment

by native tribunals. On the other hand, the concluding paragraph of Article X, page 789, provides that—

> The Creeks also agree that a court or courts may be established in said Territory, with such jurisdiction and organized in such manner as Congress may by law provide.

Hence, as there is no stipulation reserving to the Creek Nation the exclusive jurisdiction over any offenses, the Federal courts have general jurisdiction over all crimes committed by negroes in the Creek Nation, whether citizens or not; for a negro is not an Indian within the meaning of Rev. St., § 2146. (*Westmoreland* v. *United States*, *supra*, at p. 548.)

(C) The Westmoreland opinion points out that the indictment in that case clearly enough negatived all the exceptions in § 2146 of the Revised Statutes; but it tacitly assumes that an indictment for murder in the Indian country must negative these exceptions.

Was this assumption necessary? Is it necessary for an indictment charging crime in the Indian country to set forth expressly the various cases which form exceptions to the court's general jurisdiction, and then state that the case at bar does not come within any of them? This question was suggested in the Government brief in the Westmoreland case, but not argued at length.

The court's jurisdiction is based on the following section of the Revised Statutes:

> § 2145. Except as to crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to the punish-

> ment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

The exceptions are contained in the following section:

> § 2146. The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

It will be noticed that the second of the sections above quoted is entirely separate and distinct from the first. The general enabling section reads on its face as if there were no exceptions to the jurisdiction at all.

The case therefore comes within the rule stated in *United States* v. *Cook* (17 Wall., 168), where the decision arrived at by this court, as set forth in the learned opinion of Mr. Justice Clifford, is summarized as follows in the syllabus:

> Where a statute defining an offense contains an exception in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense can not be accurately and clearly described if the exception is omitted, an indictment founded upon the statute must allege enough to show that the accused is not within the exception. But if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined

> without any reference to the exception, the indictment may omit any such reference. The matter contained in the exception is matter of defense and to be shown by the accused.

So Mr. Wharton, in his discussion of indictments on statutes, treats the subject of provisos and exceptions as follows (Wharton's Crim. Pl. & Pr., 9th ed., § 238):

> The first principle that meets us is that when they are not so expressed in the statute as to be incorporated in the definition of the offense, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the statutory provisos.

So Mr. Bishop states as a general rule for indictments on statutes (1 Bish., Crim. Proc., 3rd ed., § 639):

> An exception or proviso which is not in an enacting clause, whether in the same section with it or not, need not be negatived. * * * If a statute makes a particular act punishable, and then adds "provided" that in such and such circumstances the punishment shall not be incurred, the indictment need take no notice of the word "provided" or of what follows it.

Messrs. Wharton and Bishop cite a great mass of authorities to this point.

II. In support of his claim that it was error to consolidate the indictments and to try defendant for both murders at the same time, counsel suggest that he was thus deprived of his right to challenge twenty jurors peremptorily, and that there may have been grounds for desiring the exclusion of a juror for trying the charge of killing an Indian deputy marshal which would not apply

to the case of the killing of a negro who was a private citizen. It would seem a sufficient answer to this that the prisoner does not appear to have been stinted in his number of challenges. It may be that on a trial for two or more murders, the prisoner should have been allowed twenty peremptory challenges for each murder. Possibly this particular prisoner had his forty peremptory challenges in the present case, for if the statute is not to be construed so as to allow him the twenty challenges apiece, the court has the power to protect him from any prejudice by excusing additional jurors in its own discretion.

The two crimes, however, are clearly connected together within the meaning of § 1025 of the Revised Statutes, and it appears very clearly that this defendant was not prejudiced, but that the jury were able to discriminate easily between the two crimes, for they found him guilty of manslaughter in one and of murder in the other.

III. It will be noticed that the brief for plaintiff in error refers the exception as to William Gentry's testimony to page 219 of the record, whereas the brief heretofore filed for the Government refers it to page 135. This difference might appear to be important, since the offer of testimony (if it be regarded as a sufficient offer of testimony to found any exception upon) was rejected, among other reasons, because "there is nothing at all shown so far that John Welch was armed or that he made any demonstration of any kind."

Examination of the record will show that the testimony of Gentry, at pages 218–9, is nothing but a repetition in the bill of exceptions of his testimony at pages

134–5, and that it really represents testimony offered at the very opening of defendant's case and before his defense had been developed. The extracts from the testimony of Messrs. William Gentry, James Smith, and Frank Park, at pages 218–220 of the record, seem to have got in by accident and to be a portion of what was intended as a proper bill of exceptions, but which in some way has failed of its original object and been inserted here as a mere duplication of matter previously inserted as part of a full stenographic copy of the proceedings on the trial, and whose only present result, therefore, is (doubtless unintentionally) to mislead.

The order of proof was in the discretion of the court, and it was clearly a proper exercise of that discretion to postpone the offered testimony as to defendant's strength until after the nature of the defense had been developed. We do not, therefore, discuss either the question whether the strength of the wounded man was relevant to the case, as subsequently developed, or the question whether counsel's inquiry, "Will I be permitted to show his character for strength?" is equivalent to an offer of testimony.

Respectfully submitted.

EDWARD B. WHITNEY,
Assistant Attorney General.